Supreme Court, U.S.
FILED

No. 98- 98 1716 APR 26 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PENNY KOTTERMAN, *et al.*,
Petitioners,

v.

MARK W. KILLIAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

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PETITION FOR WRIT OF CERTIORARI

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112 pp

QUESTION PRESENTED

Whether, under the principles established by *Mueller v. Allen*, 463 U.S. 388 (1983), and *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Establishment Clause of the First Amendment is violated when a state—by means of a dollar-for-dollar tax credit—redirects funds from the state treasury to a class composed exclusively of private elementary and secondary schools, most of which are sectarian and which may use the funds without restriction for religious purposes.

PARTIES

This Petition for Writ of Cetriorari is filed on behalf of petitioners Penny Kotterman, Panfilo Contreras, Frieda Baker, Rev. Dr. Gerald S. DeGrow, Joanne Hilde, Michael J. Hoogendyk, Pastor Stanley Jones, Jann Renert, James Ullman, and Rabbi Joseph Weizenbaum.

Respondents are Mark W. Killian, in his official capacity as Director of the Arizona Department of Revenue; Lisa Graham Keegan, in her capacity as Superintendent of Public Instruction and as a parent and taxpayer; Emmett McCoy, Sr. and Alfreda McCoy, in their own behalves and as natural guardians of their children, Dallas McCoy, Krystal McCoy, Sean McCoy, Brandi McCoy, Daniel McCoy, and Priscilla McCoy; Tanya Phelps, in her own behalf and as natural guardian of her children, Tasha Phelps and Leanessa Phelps; Rita Samaniego, in her own behalf and as natural guardian of her children, Geraldo Wingate, Kristin Wingate, and Sarah Wingate; Felipe Sandoval, in his own behalf and as natural guardian of his children, Felicia Sandoval and Felipe Sandoval; Sally Shanahan, in her own behalf and as natural guardian of her children, Nathan Shanahan, Kaitlyn Shanahan, Gabriel Shanahan, and Jacob Shanahan; Jeffry Flake and Trent Franks, as taxpayers; Arizona School Choice Trust, Inc.; and Louis Rhodes.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona in *Kotterman v. Killian*, —— Ariz. ——, 972 P.2d 606 (1999).

OPINION BELOW

The opinion of the Supreme Court of Arizona is reported at —— Ariz. ——, 972 P.2d 606, and is reproduced in the Appendix to this Petition at 1a.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on January 26, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Section 43-1089, Arizona Revised Statutes, provides as follows:

> A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding five hundred dollars in any taxable year. The five hundred dollar limitation also applies to taxpayers who elect to file a joint return for the taxable year. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.
>
> B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not more than five consecutive taxable years' income tax liability.
>
> C. The credit allowed by this section is in lieu of any deduction pursuant to section 170 of the internal revenue code and taken for state tax purposes.
>
> D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.
>
> E. For purposes of this section:

1. "Qualified school" means a nongovernmental primary or secondary school in this state that does not discriminate on the basis of race, color, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.[1]

2. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under section 501(c)(3) of the internal revenue code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

STATEMENT OF THE CASE

A. Statement of Facts

This action challenges the constitutionality of the Arizona Private School Tax Credit, A.R.S. § 43-1089. Enacted by the Arizona legislature in 1997, the Private School Tax Credit allows Arizona taxpayers a dollar-for-dollar credit of up to $500 against their state income tax liability each year for contributions to "School Tuition Organizations" ("STOs"). STOs are defined as charitable organizations that allocate at least 90% of their revenue to scholarships for Arizona schoolchildren to attend "non-

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[1] As originally enacted, § 43-1089(E)(1) also barred qualified schools from discriminating on the basis of "sex." This restriction was removed by a 1998 amendment.

governmental" primary or secondary schools. A.R.S. § 43-1089(E).

The Private School Tax Credit does not limit recipient private schools to nonsectarian institutions; private schools that are affiliated with churches and other religious organizations or that include religious components in their programs and operations are thus eligible to receive the funds made available under the statute. Indeed, the vast majority of such funds will flow to sectarian schools, which enroll as much as 84% of Arizona's total private-school student population.[2]

Most of these recipient sectarian schools are "pervasively sectarian" in that the secular and sectarian aspects of their educational programs are intertwined. These programs, which include religious indoctrination, worship, and the inculcation of religious beliefs, are designed to advance the religious missions of the sponsoring churches or other religious organizations.[3] The "very purpose" of these schools, as this Court has put it, "is to provide an integrated secular and religious education." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

The Private School Tax Credit places no limits on the use that private schools may make of the funds they receive. These funds may be used for any purpose the private schools deem appropriate, which in the case of sectarian schools could include the payment of salaries and expenses of employees affiliated with the religious mission of the schools, the purchase of literature and other

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[2] *See* Appendix I to Response of Intervenors/Respondents Lisa Graham Keegan, et al. to Petition for Special Action (reporting data from Maricopa and Pima counties); *see also* Petitioners' Appendix [to Petition for Special Action], Exhibit F.

[3] *See* Petitioners' Appendix [to Petition for Special Action], Exhibits G-H.

materials identified with the religious mission of the schools, the maintenance and construction of facilities used for religious purposes, and other expenditures that support or maintain religious instruction, worship, and other religious activities.

B. Proceedings Below

This action was commenced directly in the Supreme Court of Arizona on Sept mber 29, 1997, as a "Special Action" within that court's original jurisdiction. The Petition for Special Action asserted that the Private School Tax Credit was unconstitutional under both the Establishment Clause of the First Amendment to the United States Constitution and multiple provisions of the Arizona Constitution. The court accepted jurisdiction over the action and, on January 26, 1999, issued its opinion—rejecting, by a vote of 3-2, both the federal and state constitutional challenges to the Private School Tax Credit. Appendix to Petition for Certiorari ("App.") 1a.

With regard to the constitutionality of the Private School Tax Credit under the Establishment Clause, *see* App. 4a-19a, the court below applied the three-pronged inquiry called for in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Finding that the Private School Tax Credit had a secular purpose, App. 6a-7a, and did not foster excessive governmental entanglement with religion, App. 18a-19a, the court focused on the "primary effect" of the Tax Credit. App. 7a-18a. Citing *Mueller v. Allen*, 463 U.S. 388 (1983), the court held that this prong of the inquiry was satisfied because the Tax Credit was (a) "one of an extensive assortment of tax-saving mechanisms available [to Arizona taxpayers] as part of a 'genuine system of tax laws,'" App. 10a (quoting *Mueller*, 463 U.S. at 396 n.6); (b) broadly "available to all taxpayers who are willing to contribute to an STO," App. 11a; and (c)

based on "multiple layers of private choice." App. 13a. As to the last point, the court concluded that "while direct subsidies to sectarian schools may affront the Constitution, . . . [p]rivate and sectarian schools are at best only incidental beneficiaries of this tax credit . . . ." App. 18a.

The Arizona court also rejected challenges under multiple provisions of the state constitution—including Article II, § 12, which forbids the "appropriat[ion]" or "appli[cation]" of "public money" for "the support of any religious establishment," and Article IX, § 10, which prohibits the use of "public money . . . in aid of any . . . private or sectarian school"—on the theory that funds channeled to private education through the Private School Tax Credit did not constitute "public money." App. 19a-39a.

The two dissenting justices would have struck down the Private School Tax Credit under both the Establishment Clause and the Arizona Constitution. App. 40a-87a.

REASONS FOR GRANTING THE WRIT

This Court has twice had occasion to address the constitutionality under the Establishment Clause of programs through which state tax codes are used as a means of providing public financial support for students to attend private—predominantly sectarian—primary and secondary schools. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), this Court struck down, *inter alia*, that portion of a New York program that provided a tax deduction for parents of children attending private schools. Ten years later, in *Mueller v. Allen*, 463 U.S. 388 (1983), this Court upheld a Minnesota tax deduction for expenses—including, but not limited to, tuition—incurred by parents in connection with the education of their children at both public and private schools.

Since the time they were decided, *Nyquist* and *Mueller* have been the leading precedents cited by opponents and proponents, respectively, of public funding of private sectarian education—and, in particular, of the provision of such funding through manipulation of the tax code. And, as the decision of the Arizona Supreme Court upholding the Private School Tax Credit indicates, there is some confusion as to the teaching of *Nyquist* and *Mueller* with regard to this important question of Establishment Clause jurisprudence. The instant action offers this Court a timely and appropriate opportunity to explain how its holdings in *Nyquist* and *Mueller* can be harmonized, and to clarify the line that this Court has drawn between permissible and impermissible uses of the tax code to support sectarian private education.

I.

This Court consistently has recognized that "tax expenditures"—in the form of tax deductions, exemptions, credits, and the like—come within the purview of the Establishment Clause just as much as more direct governmental appropriations: "Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious "donors."'" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (plurality) (quoting *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983)). This Court thus has not hesitated to inquire into the constitutionality of tax-code provisions such as deductions, exemptions, and credits, that financially support sectarian private education at the expense of the public fisc.

At issue in *Nyquist*, *supra*, was a New York statute that provided aid to private education in multiple forms —including grants to private schools for the maintenance and repair of their facilities, tuition reimbursement grants

to low-income parents of children attending private schools, and tax benefits for parents of private-school children who were not eligible for tuition reimbursement. Observing that approximately 85% of the state's nonpublic schools were church-related, 413 U.S. at 768, this Court struck down each of the three portions of the statute, concluding that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780.

This Court found the tax benefit provided by the New York statute constitutionally indistinguishable from its direct grants for tuition reimbursement. While the tax benefit took the form of a tax deduction, this Court noted that the amount of the deduction was not related to the beneficiaries' actual expenditures for tuition, but rather was designed to yield a predetermined net tax saving in the same amount as the tuition reimbursement grants. *Id.* at 790. Under these circumstances, this Court agreed with a lower-court judge that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." *Id.* at 791 (quoting 350 F. Supp. 655, 675 (S.D.N.Y. 1972) (Hays, J., dissenting in part)). This Court specifically rejected the contention that it was "of controlling significance that the grants or credits are directed to the parents rather than to the schools," *id.*: "[F]ar from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* at 781.

The Minnesota statute that was before this Court in *Mueller*, *supra*, provided a tax benefit that—unlike the tax benefit at issue in *Nyquist*—was not limited to the

parents of children attending private schools. Rather, under the Minnesota statute all taxpayers who incurred certain educational expenses for their children were entitled to deduct those expenses in calculating their state income taxes. 463 U.S. at 391. The deductible expenses included certain types of tuition that could be incurred by both public and private school students, as well as expenditures for such things as textbooks, transportation, clothing for physical education classes, rental fees for cameras, ice skates, calculators, musical instruments, materials for home economics, shop, and art classes, pencils, and notebooks. *Id.* at 391-92 n.2.

In upholding the Minnesota statute, this Court pointed to three factors that were critical to its conclusion that the tax deduction did not have the primary effect of advancing religion—and that distinguished it in this regard from the tax benefit struck down in *Nyquist*.

First, this Court found it significant that Minnesota's tax deduction for education expenses was one of many similar deductions available under the Minnesota tax code. *Id.* at 396. That was not, by contrast, the case in *Nyquist*, where New York had provided "thinly disguised 'tax benefits,' actually amounting to tuition grants." *Id.* at 394. This Court noted in *Mueller* that it had "expressed considerable doubt [in *Nyquist*] that the 'tax benefits' provided by New York law properly could be regarded as parts of a genuine system of tax laws." *Id.* at 396 n.6. As the *Mueller* Court explained, this Court had not considered the tax benefit in *Nyquist* to be a "genuine tax deduction," and for that reason had not accorded it "the traditional rule of deference accorded legislative classifications in tax statutes." *Id.* at 397 n.6.

Second, and "[m]ost importantly," this Court emphasized that the tax deduction in *Mueller* was "available for

educational expenses incurred by *all* parents, including those whose children attended public schools . . . ." *Id.* at 397 (emphasis in original). This Court added:

> In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both [*Board of Education v. Allen*, 392 U.S. 236 (1968)] and [*Everson v. Board of Education*, 330 U.S. 1 (1947)] on the grounds that "[i]n both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools."

463 U.S. at 398 (emphasis in original). After thus distinguishing *Nyquist*, this Court reiterated the key consideration in upholding the Minnesota tax deduction: "Unlike the assistance at issue in *Nyquist*, [the Minnesota statute] permits *all* parents—whether their children attend public school or private—to deduct their children's educational expenses." *Id.* (emphasis in original).

The third factor noted by the *Mueller* Court was that, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject." *Id.* at 399. This Court made it clear, however, that this factor standing alone was not determinative. While "of some importance," it was " 'only one among many factors to be considered.' " *Id.* (quoting *Nyquist*, 413 U.S. at 781). Doubtless for that reason, this Court described the channeling of the financial assistance through individual parents as having "reduced"—not "eliminated"—the Establishment Clause objections to such assistance. Indeed, this Court recognized in *Mueller*

that it had struck down the tax benefit in *Nyquist* notwithstanding that New York also had channeled its aid to sectarian schools through individual parents. *Nyquist*, however, said this Court, was "distinguishable from this case on other grounds." *Id.* Those "other grounds" were, of course, the first two factors discussed above.

II.

Notwithstanding their opposing outcomes, *Nyquist* and *Mueller* can and should be read harmoniously. The collective teaching of these two cases with respect to the use of the tax code to provide public funds to support sectarian private education can be summarized in the following three principles.

First, although the determination of a state legislature that a tax benefit "fairly equalizes the tax burden of its citizens and encourages desirable expenditures" is normally "entitled to substantial deference," *Mueller*, 463 U.S. at 396, that will be true only with respect to tax benefits that "properly [can] be regarded as parts of a genuine system of tax laws," *id.* at 396 n.6, rather than outright governmental grants "thinly disguised," *id.* at 394, as tax benefits.

Second, the key distinction between the kind of tax benefit held unconstitutional in *Nyquist*, and the type of tax benefit this Court found "vitally different" and constitutionally permissible in *Mueller*, is whether the class that actually receives the benefit of the funds made available is limited "only to parents of children in *nonpublic* schools," or consists of "*all* parents—whether their children attend public school or private." *Id.* at 398 (emphasis in original).

Third, a state can "reduce[] the Establishment Clause objections to which its action is subject" by channeling

its aid in such a way that state funds become available to particular sectarian private schools only as the result of "numerous private choices," *id.* at 399, but that is "only one among many factors to be considered." *Id.* (quoting *Nyquist*, 413 U.S. at 781). It is not determinative—as is illustrated by the opposite results reached by this Court in *Nyquist* and *Mueller*.

This case offers this Court a timely and appropriate opportunity to confirm that the foregoing principles accurately reflect the collective teaching of *Nyquist* and *Mueller* and, in so doing, to provide badly needed guidance as to which uses of the tax code to provide financial support for private sectarian education are constitutionally permissible. Although a full analysis of the Arizona Private School Tax Credit under the *Mueller/Nyquist* principles set forth above must be reserved for briefing on the merits, a thumbnail sketch of the contours of such an analysis makes clear that the decision of the Arizona Supreme Court was erroneous and should be reversed.

A. It is exceedingly difficult to view the Private School Tax Credit as "part[] of a genuine system of tax laws." *Mueller*, 463 U.S. at 396 n.6. To the contrary, the Credit is but a "thinly disguised," *id.* at 394, use of the tax code as a means of transferring public funds to the coffers of private—mostly sectarian—schools.

In *Mueller*, this Court pointed out that the tax deduction for education expenses was only one among many deductions available to Minnesota taxpayers—including, for example, deductions for medical expenses and for charitable contributions. *Id.* at 396. While at first glance the Private School Tax Credit might appear to have much in common with the deduction for charitable contributions available under Arizona law, closer scrutiny demonstrates that this Tax Credit is of a wholly different nature, and

that it has no precedent in any other Arizona tax credit in existence at the time of its enactment.

It is important to emphasize the nature of the Private School Tax Credit: every dollar that a taxpayer "contributes" to an STO, he or she receives back through the tax credit. Thus, unlike a legitimate tax deduction for charitable contributions—which recognizes and rewards private philanthropy—there is in the case of the Private School Tax Credit *no private contribution* to a charitable organization. Rather, private giving is entirely replaced by government funding. Whatever "contribution" the taxpayer may choose to make up to the $500 limit is reimbursed in its entirety by the state, making this tax benefit simply a vehicle for redirecting public money from the public fisc to private education. Here, as in *Nyquist*, "the money involved represents a charge made upon the state for the purpose of religious education." 413 U.S. at 791.

Nor, prior to 1997 when the Private School Tax Credit was enacted, was there any precedent in Arizona law for a tax credit through which the state reimbursed 100% of a taxpayer's contribution to a private entity. Most of the state's tax credits provided a financial incentive—in the form of a credit for a fixed dollar amount or a percentage of the amount expended—for employers or other private parties to engage in socially desirable private actions.[4] A

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[4] *See* A.R.S. § 43-1074 (credit for increased employment in enterprise zones, based on percentage of wages paid); A.R.S. § 43-1076 (credit for 10% of the cost of recycling equipment); A.R.S. § 43-1077 (fixed-dollar credit for additional employment positions created by defense contractors); A.R.S. § 43-1079 (fixed-dollar credit for additional employment positions created in military reuse zones); A.R.S. § 43-1080 (credit for 10% of construction cost of environmental technology facilities); A.R.S. § 43-1081 (credit of 10% of purchase price of pollution control equipment); A.R.S. § 43-1082 (credit of 5% of purchase price of construction materials for certain industrial facilities); A.R.S. § 43-1083 (credit of 25% of cost of solar energy devices); A.R.S. § 43-1084 (credit of 75% of

smaller number of tax credits of 100% or less were allowed for certain other taxes or fees paid to public entities,[5] and one tax credit had the effect of increasing the personal exemption for low-income families.[6] But with the Private School Tax Credit the state for the first time adopted a tax credit that simply reimburses taxpayers for their contributions to private third parties—thus using the mechanism of a tax credit as a substitute for direct legislative appropriations.[7]

Where a state has provided what in effect are "outright grants," *Mueller*, 463 U.S. at 396-97 n.6, to support sectarian private education, this Court has not allowed the fact that such "grants" are made through manipulation of the tax code—rather than through direct legislative appropriations—to affect its review of such public expenditures under the Establishment Clause. The "tax credit" at issue here is in effect such an outright grant—not a legitimate "part[] of a genuine system of tax laws," *id.*—and thus requires exacting scrutiny.

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expense of agricultural water conservation systems); A.R.S. § 43-1085 (credit of 10% of cost of corrective action for underground storage tanks); A.R.S. § 43-1086 (fixed-dollar credit for purchase of alternative fuel vehicles and equipment); A.R.S. § 43-1087 (credit for increased employment of recipients of temporary assistance for needy families, based on percentage of wages paid).

[5] *See* A.R.S. § 43-1071 (100% credit for income taxes paid to other states); A.R.S. § 43-1072 (property tax credit of up to 100% for low-income elderly persons); A.R.S. § 43-1078 (percentage credit for property taxes paid by defense contractors); A.R.S. § 43-1089.01 (100% credit for fees paid to public schools for extracurricular activities).

[6] *See* A.R.S. § 43-1073.

[7] In the same 1997 legislative session in which the Private School Tax Credit was enacted, the Arizona legislature also enacted a 100% tax credit for contributions of up to $200 to charitable organizations that provide assistance to the working poor, A.R.S. § 43-1088, which is similar in form to the Private School Tax Credit.

B. The heart of the *Mueller/Nyquist* inquiry goes to the issue of whether, in *Mueller*'s language, the benefit is broadly "available for educational expenses incurred by *all* parents," 463 U.S. at 397 (emphasis in original)—"whether their children attend public school or private," *id.* at 398—or, to the contrary, is "provided only to parents of children in *nonpublic* schools." *Id.* (emphasis in original).[8]

The court below disposed of this issue in a scant paragraph, asserting that here the "class of beneficiaries is even broader than that found acceptable in *Mueller*," App. 11a, in that "the Arizona tuition credit is available to all taxpayers who are willing to contribute to an STO. Any individual, not just a parent, may donate to the scholarship program." *Id.*

That analysis is defective in several respects. To begin with, the taxpayers who contribute to STOs and receive a reimbursement of their contributions through the Private School Tax Credit are not the ones who derive the benefit from this statute; the balance sheet is, for them, a "wash." The focus, therefore, must be on the breadth of the class that actually receives the benefit of the funds made available through the Tax Credit.[9]

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[8] *See also Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 487-88 (1986) (upholding aid program "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited") (quoting *Nyquist*, 413 U.S. at 782-83 n.38).

[9] Even if one did focus on the taxpayers, moreover, the result would still be the same as that outlined below: only those taxpayers who wish to make contributions to support education at private schools are entitled to the tax credit. Similarly, should one focus on the STO pass-through entities, it is only organizations that provide scholarships to "nongovernmental" schools that qualify as STOs for purposes of the Private School Tax Credit. A.R.S. § 43-1089(E).

Whether one conceives of that benefit as flowing to the private schools that ultimately receive the funds as tuition, or rather to the parents of children who receive scholarships to attend such schools, the class of those who benefit is in either case limited to the sector of private—predominantly sectarian—education. *See* A.R.S. § 43-1089(E)(1) (defining "qualified school" as a "nongovernmental" primary or secondary school). Here, as in *Nyquist*, the "public assistance amounting to tuition grants [is] provided only to parents of children in *nonpublic* schools." *Mueller*, 463 U.S. at 398 (emphasis in original). Unlike the situation in *Mueller*, where the statute on its face provided a tax benefit that could be used by parents of students in both public and private schools, and where this Court accordingly declined to speculate as to what percentage of that benefit was likely to be used by parents in either sector, *see* 463 U.S. at 401, it is clear from the face of A.R.S. § 43-1089 that *all* of the proceeds of the Private School Tax Credit will go to private schools and their students.

In short, the Private School Tax Credit benefits only private (predominantly sectarian) schools and the students who attend them, excluding public schools and their students altogether. Accordingly, it falls on the same side of the line as the statute struck down in *Nyquist* rather than the one upheld in *Mueller*.[10]

C. In upholding the Private School Tax Credit, the court below devoted the bulk of its attention to the "nu-

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[10] The court below thought significant that a different tax credit is available for taxpayers who pay up to $200 in fees to public schools for certain extracurricular activities. *See* App. 17a (citing A.R.S. § 43-1089.01). As noted above, *see supra* note 5, this is one of a number of Arizona tax credits that reduce the taxpayer's state income tax in compensation for certain other taxes and fees paid to governmental entities. Unlike the Private School Tax Credit, A.R.S. § 43-1089.01 does not reimburse taxpayers for their voluntary contributions.

merous private choices" through which the funds provided by the tax credit reach sectarian private schools. App. 12a (quoting *Mueller*, 463 U.S. at 399). The court's error in this regard was not in noting the point—which this Court's decisions have indicated is relevant—but in according controlling significance to the fact that, to a limited extent, "private individuals choose where the funds will go." App. 12a.

While it is true that private individuals do make choices that determine the specific private schools to which funds from the Private School Tax Credit will go, what the court below overlooked is that the same was true of the tax benefit struck down in *Nyquist*. In analyzing the tax deduction at issue in *Mueller*, therefore, this Court observed that private choice was "of *some* importance . . . , albeit 'only one among many factors to be considered.' " 463 U.S. at 399 (emphasis added) (quoting *Nyquist*, 413 U.S. at 781). Thus, Minnesota "reduced"—but did not eliminate—the Establishment Clause objections to its statute by "channeling whatever assistance it may provide to parochial schools through individual parents." 463 U.S. at 399.

The specific choices made by private individuals that determine which particular private schools will receive funds under the Private School Tax Credit should not obscure the fundamental choice—made by the state—about where these public funds will go. The state has chosen to channel these funds *exclusively* to private schools, and the choices of private individuals must be made within that restricted universe. This is the factor that ultimately was determinative in *Mueller*; it was—along with whether the tax benefit was part of "a genuine system of tax laws"—the basis upon which this Court distinguished the tax benefit it had struck down in *Nyquist*. *See* 463 U.S. at 399.

The state's choice to redirect public funds—via a unique and unprecedented 100% tax credit—from the public fisc exclusively to private schools is the critical choice for purposes of analyzing the Private School Tax Credit. This use of the tax code to channel unrestricted public funds to a recipient class composed exclusively of private schools, most of which are pervasively sectarian, "represents a charge made upon the state for the purpose of religious education." *Nyquist*, 413 U.S. at 791. The decision of the Arizona Supreme Court is, accordingly, inconsistent with the principles established by this Court in *Mueller* and *Nyquist*, and it therefore should be reviewed and reversed.

III.

Because the Arizona Supreme Court has decided the important Establishment Clause question presented by the Private School Tax Credit in a way that conflicts with the collective teaching of *Mueller* and *Nyquist*, a grant of certiorari is warranted under Supreme Court Rule 10(c). But the Arizona court's decision also is symptomatic of a more generalized confusion as to the line that this Court has drawn between permissible and impermissible uses of the tax code to provide financial support for sectarian private education. This case offers this Court the opportunity to clarify that line by explaining how its holdings in *Mueller* and *Nyquist* can be harmonized.

Guidance from this Court is important for practical as well as doctrinal reasons. Estimates of the amount of public funds that would be channeled to private, predominantly sectarian, education under the Private School Tax Credit vary widely, but the Arizona Department of Revenue has concluded that $75 million annually would be a "not unreasonable" estimate, and that an estimate of $35

million would be "extremely conservative."[11] Nor is the significance of this issue by any means limited to Arizona. Legislation pursuant to which the state tax code is used in some way to provide public financial support for sectarian private education has been introduced during this year's legislative sessions in at least twenty other states. This Court should grant certiorari in order to provide states that are considering this type of legislation with a clear understanding as to its permissibility *vel non* under the Establishment Clause.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[11] Petitioners' Appendix [to Petition for Special Action], Exhibit D.

APPENDIX

APPENDIX

[Filed Jan. 26, 1999]

SUPREME COURT OF ARIZONA
En Banc

Supreme Court No. CV-97-0412-SA

PENNY KOTTERMAN, PANFILO CONTRERAS, FREIDA BAKER, REV. DR. GERALD S. DEGROW, JOANNE HILDE, MICHAEL J. HOOGENDYK, PASTOR STANLEY JONES, JANN RENERT, LOUIS RHODES, JAMES ULLMAN, and RABBI JOSEPH WEIZENBAUM,

Petitioners,

v.

MARK W. KILLIAN, in his official capacity as Director of the Arizona Department of Revenue,

Respondent,

LISA GRAHAM KEEGAN, in her capacity as Superintendent of Public Instruction and as a parent and taxpayer; EMMETT MCCOY, SR. and ALFREDA MCCOY, in their own behalves and as natural guardians of their children, DALLAS MCCOY, KRYSTAL MCCOY, SEAN MCCOY, BRANDI MCCOY, DANIEL MCCOY, and PRISCILLA MCCOY; TANYA PHELPS, in her own behalf and as natural guardian of her children, TASHA PHELPS and LEANESSA PHELPS; RITA SAMANIEGO, in her own behalf and as natural guardian of her children, GERALDO WINGATE, KRISTIN WINGATE, and SARAH WINGATE; FELIPE SANDOVAL, in his own behalf and as natural guardian of his children, FELICIA SANDOVAL and FELIPE SANDOVAL; SALLY SHANAHAN, in her own behalf and as

natural guardian of her children, NATHAN SHANAHAN, KAITLYN SHANAHAN, GABRIEL SHANAHAN, and JACOB SHANAHAN; and JEFFREY FLAKE and TRENT FRANKS, as taxpayers; ARIZONA SCHOOL CHOICE TRUST, INC.,
Intervenors/Respondents.

SPECIAL ACTION
JURISDICTION ACCEPTED, RELIEF DENIED

ZLAKET, Chief Justice.

¶1 Petitioners challenge the constitutionality of A.R.S. § 43-1089 (1997), which allows a state tax credit of up to $500 for those who donate to school tuition organizations (STOs). The statute reads as follows:

> A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of voluntary cash contributions made by the taxpayer during the taxable year to a school tuition organization, but not exceeding five hundred dollars in any taxable year. The five hundred dollar limitation also applies to taxpayers who elect to file a joint return for the taxable year. A husband and wife who file separate returns for a taxable year in which they could have filed a joint return may each claim only one-half of the tax credit that would have been allowed for a joint return.
>
> B. If the allowable tax credit exceeds the taxes otherwise due under this title on the claimant's income, or if there are no taxes due under this title, the taxpayer may carry the amount of the claim not used to offset the taxes under this title forward for not

more than five consecutive taxable years' income tax liability.

C. The credit allowed by this section is in lieu of any deduction pursuant to § 170 of the internal revenue code and taken for state tax purposes.

D. The tax credit is not allowed if the taxpayer designates the taxpayer's donation to the school tuition organization for the direct benefit of any dependent of the taxpayer.

E. For purposes of this section:

1. "Qualified school" means a nongovernmental primary or secondary school in this state that does not discriminate on the basis of race, color, sex, handicap, familial status or national origin and that satisfies the requirements prescribed by law for private schools in this state on January 1, 1997.

2. "School tuition organization" means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the internal revenue code and that allocates at least ninety percent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school.

A.R.S. § 43-1089 (footnotes omitted). Petitioners claim that this law violates the Federal Establishment Clause and three provisions of the Arizona Constitution. We have original jurisdiction pursuant to Ariz. Const. art. VI, § 5(1) and Ariz. R. Spec. Act. 1(a) and 3(b).

FEDERAL CONSTITUTION

¶ 2 The Establishment Clause, applicable to the states by authority of the Fourteenth Amendment, proclaims that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I; *see also Everson v. Board of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511 (1947). The simplicity of this language belies its complex and continually evolving interpretation by the United States Supreme Court. *See generally* Kristin M. Engstrom, Comment, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test,* 27 Pac. L.J. 121 (1995); *see also* Andrew A. Adams, Note, *Cleveland, School Choice, and "Laws Respecting an Establishment of Religion,"* 2 Tex. Rev. L. & Pol. 165, 171-75 (1997). That Court's decisions reflect an effort to steer a course of "constitutional neutrality," *Walz v. Tax Comm'n,* 397 U.S. 664, 669, 90 S. Ct. 1409, 1411 (1970), aimed "between avoidance of religious establishment on the one hand, and noninterference with religious exercise on the other." Leonard J. Henzke, Jr., *The Constitutionality of Federal Tuition Tax Credits,* 56 Temp. L.Q. 911, 924 (1983). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S. Ct. 1673, 1683 (1982). Similarly, religion may not be preferred over nonreligion. *See Everson,* 330 U.S. at 18, 67 S. Ct. at 513.

¶ 3 This emphasis on neutrality is apparent in a recent line of Supreme Court cases upholding a variety of educational assistance programs. *See Agostini v. Felton,* 521 U.S. 203, ——, 117 S.Ct. 1997, 2016 (1997), *overruling Aguilar v. Felton,* 473 U.S. 402, 105 S. Ct. 3232 (1985) (public school teachers providing remedial educa-

tion to disadvantaged children in parochial schools); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46, 115 S. Ct. 2510, 2524-25 (1995) (state university funds used to pay printing costs of student newspaper espousing religious viewpoint); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3, 113 S. Ct. 2462, 2464 (1993) (sign-language interpreter provided for deaf student in sectarian high school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 482, 106 S. Ct. 748, 749 (1986) (state financial assistance to blind student attending private Christian college); *Mueller v. Allen*, 463 U.S. 388, 390-91, 103 S. Ct. 3062, 3064-65 (1983) (state income tax deduction for educational expenses, including those incurred at sectarian schools).

¶ 4 Other courts in recent years have also found state educational aid programs to be in compliance with the First Amendment. *See Jackson v. Benson*, 578 N.W.2d 602, 619 (Wis. 1998), *cert. denied*, —— U.S. ——, 119 S. Ct. 466 (1998) (distribution of tuition vouchers for use in private, including sectarian, schools); *Matthew J. v. Massachusetts Dep't of Educ.*, 989 F.Supp. 380, 391-92 (D. Mass. 1998) (reimbursement of special education tuition costs at private sectarian school).

¶ 5 In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971), the Supreme Court adopted a three-pronged test for evaluating compliance with the Establishment Clause. Simply stated, a statute does not violate the First Amendment if (1) it serves a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not "foster an excessive government entanglement with religion." *Id.* (quoting *Walz*, 397 U.S. at 674, 90 S. Ct. at 1414). While other approaches have been considered by the

Court,[1] we believe that the "well settled" *Lemon* standard provides an appropriate framework for our review. *See Mueller*, 463 U.S. at 394, 103 S. Ct. at 3066.

Secular Purpose

¶ 6 The Supreme Court rarely attributes an unconstitutional motive to a legislative act such as this, "particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-95, 103 S. Ct. at 3067. The Minnesota law at issue in *Mueller* permitted a tax deduction for tuition, textbook, and transportation expenses of children attending elementary or secondary schools. *Id.* at 391 103 S. Ct. at 3065. In upholding it, the Court said:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated.

Id. at 395, 103 S. Ct. at 3067.

¶ 7 The Arizona Legislature has, in recent years, expanded the options available in public education. *See, e.g.*, A.R.S. § 15-181 (1994) (establishing charter schools in

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[1] *See Board of Educ. v. Grumet*, 512 U.S. 687, 705, 114 S. Ct. 2481, 2492 (1994) (finding creation of special school district for religious enclave violated "the requirement of government neutrality"); *Lee v. Weisman*, 505 U.S. 577, 586-87, 112 S. Ct. 2649, 2655 (1992) (holding that graduation benedictions in public schools coerce support for religion); *Wallace v. Jaffree*, 472 U.S. 38, 69-70, 105 S. Ct. 2479, 2496-97 (1985) (O'Connor, J., concurring) (setting forth the "endorsement test").

order to "provide additional academic choices for parents and pupils"); A.R.S. § 15-816.01(A) (1995) (requiring all public school districts to "implement an open enrollment program without charging tuition"). It now seeks to bring private institutions into the mix of educational alternatives open to the people of this state.

¶ 8 The encouragement of private schools, in itself, is not unconstitutional. Such a policy can properly be used to facilitate a state's overall educational goals. As the *Mueller* majority noted, private schools frequently serve to stimulate public schools by relieving tax burdens and producing healthy competition. 463 U.S. at 395, 103 S. Ct. at 3067 (quoting *Wolman v. Walter*, 433 U.S. 229, 262, 97 S. Ct. 2593, 2613 (1977) (Powell, J., concurring in part and dissenting in part)). They also further the objective of making quality education available to all children within a state. Thus, the legislature may "conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian." *Id.* at 395, 103 S. Ct. at 3067. In our view, the secular purpose prong of *Lemon* is satisfied here.

Primary Effect

¶ 9 We next examine whether the principal effect of the law is to further "sectarian aims of the nonpublic schools." *Id.* at 396, 103 S. Ct. at 3067 (quoting *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662, 100 S. Ct. 840, 851 (1980)). We begin by noting that the legislature's taxing authority is very broad. *See Kelly v. Allen*, 49 F.2d 876, 877 (9th Cir. 1931) ("The power of the state to tax is unlimited."); *Tanque Verde Enters. v. City of Tucson*, 142 Ariz. 536, 542, 691 P.2d 302, 308 (1984) ("[S]etting tax rates is a legislative function."). Therefore, courts extend considerable deference

and great latitude to the legislative creation of "classifications and distinctions in tax statutes." *Mueller*, 463 U.S. at 396, 103 S. Ct. at 3067 (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 547, 103 S. Ct. 1997, 2002 (1983)).

¶ 10 The *Mueller* Court identified certain significant features of the Minnesota statute in upholding its constitutionality, namely: (1) the deduction in question was one of many allowed by the state; (2) it was open to all parents incurring educational expenses; and (3) funds were available "only as a result of numerous, private choices of individual parents." 463 U.S. at 396-400, 103 S. Ct. at 3067-70. In other words, aid was provided on a neutral basis with any financial benefit to private schools sufficiently attenuated.

One of Many

¶ 11 Petitioners contend that credits are constitutionally different from deductions, which they concede to be perfectly proper. At oral argument they asserted that a tax credit is the "functional equivalent of depleting the state treasury by a direct grant," while a tax deduction merely serves as "seed money" to encourage philanthropy. We disagree.

¶ 12 It is true, of course, that there are mechanical differences between deductions and credits. The former are subtracted from gross income, reducing the net amount on which a tax is assessed according to the taxpayer's marginal rate, while the latter are taken directly from the tax as tentatively calculated. Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen*, 31 Wayne L. Rev. 157, 172-73 (1984); *see* James J. Freeland et al., *Fundamentals of Federal Income Taxation* 969 (7th ed. 1991). Moreover, limits placed on

these benefits may be sharply divergent. We do not believe, however, that such distinctions are constitutionally significant. Though amounts may vary, both credits and deductions ultimately reduce state revenues, are intended to serve policy goals, and clearly act to induce "socially beneficial behavior" by taxpayers. Baergen, *supra*, at 173.

¶ 13 In *Committee for Public Education & Religious Liberty v. Nyquist*, a case heavily relief upon by the petitioners, the Supreme Court said that the constitutionality of a tax benefit "does not turn in any event on the label we accord it." 413 U.S. 756, 789, 93 S. Ct. 2955, 2974 (1973). This statement is consistent with the Court's earlier observation in *Lemon* that the form of any tax measure must be examined "for the light that it casts on the substance." 403 U.S. at 614, 91 S. Ct. at 2112. In *Nyquist*, a New York statute provided state funds for the maintenance and repair of private schools. It also contained a tax deduction for parents of children attending such schools. 413 U.S. at 762-64, 93 S. Ct. at 2960-61. The Supreme Court struck down these provisions, holding that they amounted to direct stipends having the primary effect of impermissibly advancing religion. *Id.* at 779-80, 791, 93 S. Ct. at 2969, 2975. It is important to note, however, that the New York "deduction," based on a statutory formula, was plainly designed to achieve a net per-family gain. *Id.* at 790, 93 S. Ct. at 2974. This preset benefit was offered to parents without regard for the amount of expense they actually incurred. *Id.*

¶ 14 As the *Mueller* Court described a decade later, *Nyquist* involved "thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children atending private schools." 463 U.S. at 394, 103 S. Ct. at 3066. The Court also observed that the New York deduction had been totally inconsistent with others allowed under the laws of that state. *Id.* at 396 n.6, 103 S. Ct.

at 3068 n.6. In contrast, the Minnesota deduction for actual school expenses was "only one among many" available under the state's tax code, including those for medical expenses and charitable contributions. *Id.* at 396, 103 S. Ct. at 3067. Unlike the measure in *Nyquist*, which was likened to an outright grant, the Minnesota statute embodied a "genuine tax deduction." *Id.* at 396 n.6, 103 S. Ct. at 3068 n.6.

¶ 15 Deductions and credits are legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals. *See* Baergen, *supra*, at 172-76. We conclude that the Arizona school tuition tax credit is one of an extensive assortment of tax-saving mechanisms available as part of a "genuine system of tax laws." *Mueller* at 396 n.6, 103 S. Ct. at 3068 n.6. For instance, the state permits its taxpayers to take the full "amount of itemized deductions allowable" under the Internal Revenue Code. A.R.S. § 43-1042(A). This, of course, includes charitable contributions made directly to churches, religious schools, and other § 501(c)(3) organizations.[2] *See* 26 U.S.C. § 170(c)(2)(D). Arizona's tax

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[2] To qualify for § 501(c)(3) status an entity must be "organized and operated exclusively" for certain statutorily defined purposes. 26 U.S.C. § 501(c)(3). These include "religious, charitable [and] scientific" as well as "literary, or educational purposes." *Id.* The Supreme Court has determined that "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." *Davis v. United States*, 495 U.S. 472, 482-83, 110 S. Ct. 2014, 2021 (1990) (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 588, 103 S. Ct. 2017, 2026 (1983)). Consequently, under both federal and state law, organizations unabashedly devoted to promoting religion—churches and other religious institutions—enjoy a number of direct economic tax benefits. These organizations escape income taxes, *see* A.R.S. § 43-1201(4), (11), and are not required to file returns, *see* A.R.S. § 43-1242. Taxpayers who

code also provides for numerous credits beyond those permitted at the federal level, each operating in the same general way. *See* A.R.S. §§ 43-1071 through 43-1090.01. Among them is a credit for voluntary cash contributions made to qualifying organizations that provide assistance to the working poor. *See* A.R.S. § 43-1088. Such organizations clearly count among their number churches, synagogues, missions, and other sectarian institutions. Also noteworthy in the context of the present discussion is a $200 tax credit for *public* school extracurricular activity fees, covering items such as band uniforms, athletic gear, and scientific laboratory equipment. A.R.S. § 43-1089.01. Thus, as in Minnesota, the Arizona tax benefit now under consideration is "only one among many." *Mueller,* 463 U.S. at 396, 103 S. Ct. at 3067.

Availability

¶ 16 The *Mueller* Court placed particular emphasis on the fact that the benefits of Minnesota's tax deduction extended to a broad class of recipients, not just to the parents of private school children as in *Nyquist.* 463 U.S. at 397-98, 103 S. Ct. at 3068. By way of comparison, the Arizona tuition credit is available to all taxpayers who are wiling to contribute to an STO. Any individual, not just a parent, may donate to the scholarship program. Thus, Arizona's class of beneficiaries is even broader than that found acceptable in *Mueller,* and clearly achieves a greater level of neutrality.

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donate to them can deduct the contributions from their federal and state income taxes. *See* 26 U.S.C. § 170; A.R.S. § 43-1042(A). Additionally, many of these organizations are exempt from property taxes, *see* Ariz. Const. art. IX, § 2(2), a direct government benefit which has long been held nonviolative of the Establishment Clause. *See Walz,* 397 U.S. at 672-73, 90 S. Ct. at 1413-14.

Private Choices

¶ 17 The Supreme Court also stressed the means by which funds reach sectarian schools and the importance of "numerous, private choices" in contrast to direct state financial aid. *Mueller,* 463 U.S. at 399, 103 S. Ct. at 3069. Where assistance to religious institutions is indirect and attenuated, i.e., private individuals choose where the funds will go, the Justices have generally been reluctant to find a constitutional impediment. *See Witters,* 474 U.S. at 488, 106 S. Ct. at 752 (aid flowing to religious institutions does so "only as a result of the genuinely independent and private choices of aid recipients"); *Zobrest,* 509 U.S. at 10, 113 S. Ct. at 2467 (presence of government-paid interpreter in sectarian school was result of the "private decision of individual parents").

¶ 18 A recent decision by the Wisconsin Supreme Court upholding the constitutionality of school vouchers provides further support. *Jackson v. Benson,* 578 N.W.2d 602 (Wis. 1998), *cert. denied,* —— U.S. ——, 119 S. Ct. 466 (1998). In 1995, the Wisconsin Legislature amended a statute requiring the state to pay the educational costs of low-income Milwaukee parents who desired to send their children to private schools. *Id.* at 607-08. Under the amended Milwaukee Parent choice Program (MPCP), parents were permitted to select a private school, which could be sectarian or secular, and received a payment from the state to cover expenses. *Id.* at 608-09. The check was sent directly to the school but was made out to the parents, who endorsed it over to the educational institution. *Id.* at 609. No restrictions were placed on the use to which the school could put the money.[3] *Id.* The

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[3] The dissent believes that limits must be placed on the uses to which schools may put tuition money coming from STOs. *Infra* at ¶ 94. But *Mueller* itself, while disallowing a tax deduction for the cost of textbooks used for religious instruction, placed no

Wisconsin court held that the program was permissible under both the federal and state constitutions, *id.* at 607, stating in part:

> In our assessment, the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path. As with the programs in *Mueller* and *Witters*, not one cent flows from the State to a sectarian private school under the amended MPCP except as a result of the necessary and intervening choices of individual parents.

Id. at 618.

¶ 19 Arizona's statute provides multiple layers of private choice. Important decisions are made by two distinct sets of beneficiaries—taxpayers taking the credit and parents applying for scholarship aid in sending their children to tuition-charging institutions. The donor/taxpayer determines whether to make a contribution, its amount, and the recipient STO. The taxpayer cannot restrict the gift for the benefit of his or her own child. A.R.S. § 43-1089(D). Parents independently select a school and apply to an STO of their choice for a scholarship. Every STO must allow its scholarship recipients to "attend *any* qualified school of their parents' choice," and may not

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restriction on the uses to which the schools could put tuition payments qualifying for the deduction. *See* 463 U.S. at 390 n.1, 103 S. Ct. at 3064 n.1. In addition, the statute in *Mueller* contained no "opt out" provision or requirement that schools admit students without regard to religion, features that our dissenting colleague finds so critical in *Jackson*. *Infra* at ¶ 99. Our tax credit statute is more like the tax deduction in *Mueller* than the voucher program in *Jackson*. Even in *Jackson*, however, no limits were placed on the uses to which the recipient schools could put the state aid. 578 N.W.2d at 609.

limit grants to students of only one such institution. A.R.S. § 43-1089(E)(2) (emphasis added). Thus, schools are no more than indirect recipients of taxpayer contributions, with the final destination of these funds being determined by individual parents.

¶ 20 The decision-making process is completely devoid of state intervention or direction and protects against the government "sponsorship, financial support, and active involvement" that so concerned the framers of the Establishment Clause. *Walz*, 397 U.S. at 668, 90 S. Ct. at 1411. As the *Mueller* Court noted, "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit." 463 U.S. at 400, 103 S. Ct. at 3070. Under the circumstances, we believe that "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493, 106 S. Ct. at 755 (O'Connor, J., concurring); *see also Zobrest*, 509 U.S. at 10, 113 S. Ct. at 2467.

¶ 21 The dissent essentially characterizes the option offered to taxpayers as a sham because "there is no real choice—one may contribute up to $500 to support private schools or pay the same amount to the Arizona Department of Revenue."[4] *Infra* at ¶ 90. Such an argument plainly ignores the many other credits and deductions available in Arizona. It also assumes that maximum tax avoidance is the inescapable motive of taxpayers in every decision they make. We know, however, that people fre-

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[4] This statement, like so many others in the dissent, wrongly gives the impression that private schools, rather than scholarship recipients, are the primary beneficiaries of contributions.

quently donate to causes or organizations offering limited or no tax benefits. Moreover, while it seems a part of human nature to bemoan taxes, their importance to society is generally recognized. This tax credit may provide incentive to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all.

¶ 22 We see little difference in the levels of choice available to parents under the Minnesota and Arizona plans. In both, parents are free to participate or not, to choose the schools their children will attend, and to take advantage of all other available benefits under the state tax scheme. Moreover, these programs will undoubtedly bring new options to many parents. Basic education is compulsory for children in Arizona, A.R.S. § 15-802(A), but until now low-income parents may have been coerced into accepting public education. These citizens have had few choices and little control over the nature and quality of their children's schooling because they have been unable to afford a private education that may be more compatible with their own values and beliefs. Arizona's tax credit achieves a higher degree of parity by making private schools more accessible and providing alternatives to public education. *See Mueller*, 463 U.S. at 402, 103 S. Ct. at 3070-71 (educational expense deduction worked as set-off against added financial burden faced by parents of private school students); *Jackson*, 578 N.W.2d at 619 (school voucher program "place[d] on equal footing options of public and private school choice, and vest[ed] power in the hands of parents to choose where to direct the funds allocated for their children's benefit").

¶ 23 Petitioners argue that this law is fatally deficient because religious schools are the practical beneficiaries of the tax credit. They contend that the "pervasively sec-

tarian" composition of private schools in this state presumes an inevitable constitutional breach. Like the appellants in *Mueller*, petitioners purport to rely on a statistical analysis of private school populations. *See* 463 U.S. at 400-01, 103 S. Ct. at 3070. The Supreme Court dismissed this approach as follows:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Id. at 401, 103 S. Ct. at 3070. According to the statistics offered in *Mueller*, ninety-five percent of Minnesota's private school students attended sectarian schools. *Id.* at 391, 103 S. Ct. at 3065. Petitioners' numbers reflect a lower rate of religious school attendance in Arizona. Like the *Mueller* Court, however, we refuse to hinge constitutional scrutiny on such ephemeral numbers. School populations change, as does the quality of education. No one yet knows how many taxpayers will take the credit, what dollar amounts will be generated, or how many students will receive tuition scholarships, let alone their statistical distribution among schools. We also cannot predict how this tax credit may affect the ratio of secular to sectarian private institutions in the state.

¶ 24 Both Minnesota and Arizona provide by statute for free public education. *See* Minn. Stat. § 120.06

(1959); A.R.S. § 15-816.01 (1995). Consequently, parents of children seeking to attend tuition-charging schools are those most in need of financial assistance. This does not mean, however, that the statute unconstitutionally benefits a narrow segment of the population. As we have seen, the Arizona tax credit allows *all* taxpayers to give their funds voluntarily in support of a multi-dimensional educational system for the state, and its benefits flow in virtually every direction.

¶ 25 It is argued that A.R.S. § 43-1089 is unconstitutional because it does not provide a credit for those who wish to support public education. We disagree. A contemporaneous and related statute, A.R.S. § 43-1089.01, allows a tax credit of up to $200 for fees paid by taxpayers in support of public school extracurricular activities. The fact that this benefit is capped at $200 does not render the $500 credit for STO donations unconstitutional. The tuition expense of a private education is usually greater than the fees associated with extracurricular activities in a public school. The legislature's decision to set a lower amount for the latter is likely an acknowledgment of that disparity. Moreover, it strikes us as meaningless to offer a tax credit for tuition scholarships to schools that charge no tuition. The taxpayers in this state already pay for the establishment and operation of a public school system. Even parents who send their children to private schools must pay taxes in support of public education. Finally, because the ultimate goal of educational assistance programs is to reimburse parents for expenses incurred in schooling their children, a credit for contributions to the "educational mission of the public school system," *infra* at ¶ 76, is both distinguishable and unnecessary for purposes of our constitutional analysis.

¶ 26 The primary beneficiaries of this credit are taxpayers who contribute to the STOs, parents who might

otherwise be deprived of an opportunity to make meaningful decisions about their children's educations, and the students themselves. We realize, of course, that the benefits do not end there. The ripple effects can, when viewed through a wide-angle lens, radiate to infinity. But while direct subsidies to sectarian schools may affront the Constitution, "the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution." *Witters*, 474 U.S. at 486, 106 S. Ct. at 751. Private and sectarian schools are at best only incidental beneficiaries of this tax credit, a neutral result that we believe is attenuated enough to satisfy *Mueller* and the most recent Establishment Clause decisions. *See* 463 U.S. at 399, 103 S. Ct. at 3069; *Agostini*, 521 U.S. at ——, 117 S. Ct. at 2014; *Zobrest*, 509 U.S. at 8, 113 S. Ct. at 2466; *Witters*, 474 U.S. at 488-89, 106 S. Ct. at 752; *Matthew J.*, 989 F. Supp. at 392.

¶ 27 In summary, we conclude that the tuition tax credit does not prefer one religion over another, or religion over nonreligion. It aids a "broad spectrum of citizens," *Mueller*, 463 U.S. at 399, 103 S. Ct. at 3069, allows a wide range of private choices, and does not have the primary effect of either advancing or inhibiting religion.

Excessive Entanglement

¶ 28 Finally, we find no "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613 (citation omitted). The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive. Taxpayers who choose to participate may deduct the amount of an STO contribution on their tax returns. The STO operates free of government interference beyond ensuring that it qualifies for § 501(c)(3) tax exempt status and complies with state requirements.

Any perceived state connection to private religious schools is indirect and attenuated.

¶ 29 We are persuaded that § 43-1089 falls within the parameters of the Establishment Clause.

ARIZONA CONSTITUTION

¶ 30 Petitioners argue that this tax credit channels public money to private and sectarian schools in violation of the state constitution. Specifically, they charge that the law offends article II, § 12 and article IX, § 10 (the "religion clauses"), as well as article IX, § 7 (the "anti-gift clause").

¶ 31 Legislative enactments are presumptively constitutional. *Hall v. A.N.R. Freight Sys.*, 149 Ariz. 130, 133, 717 P.2d 434, 437 (1986). The party challenging a statute bears the burden of demonstrating its invalidity, *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978), and we resolve all uncertainties in favor of constitutionality. *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981).

Religion Clauses

¶ 32 Article II, § 12 states in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Article IX, § 10 says, "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."

"*Public Money or Property*"

¶ 33 The parties are in considerable disagreement over the meaning of "public money or property." No defini-

tion of these words appears in the Arizona Constitution or in our statutes. We must therefore look to their "natural, obvious and ordinary meaning." *County of Apache v. Southwest Lumber Mills*, 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962); *see also McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982) ("When the words of a constitutional provision are not defined within it, the meaning to be ascribed to the words is that which is generally understood and used by the people."); *Dunn v. Industrial Comm'n*, 177 Ariz. 190, 194, 866 P.2d 858, 862 (1994) (requiring court to give clear and unambiguous statutory language its plain meaning unless doing so would lead to absurd results).

¶ 34 In *McClead v. Pima County*, our court of appeals observed that "state funds" are those "raised by the operation of some general law and therefore belonging to the state." 174 Ariz. 348, 356, 849 P.2d 1378, 1386 (App. 1992). A decade earlier we identified "state money" as "money in the state treasury credited to a particular fund therein." *Grant v. Board of Regents*, 133 Ariz. 527, 529, 652 P.2d 1374, 1376 (1982). State title to funds, however, does not always vest when money enters the state treasury. For example, when the government is a mere custodian or conduit, funds so held do not constitute "state monies." *Navajo Tribe v. Arizona Dep't of Admin.*, 111 Ariz. 279, 280-81, 528 P.2d 623, 624-25 (1974).

¶ 35 Other courts have reached similar conclusions. *See Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1241 (Md. 1998) ("gross recovery from the tobacco litigation is not 'State' or 'public' money" until deposited into state treasury); *State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 348 (Ind. Ct. App. 1995) (private donations received by corporation for use or benefit of state university were not public funds because

they did not come into the possession of, and were not entrusted to, a public officer); *Sherard v. State*, 509 N.W.2d 194, 199-200 (Neb. 1993) (money in workers' compensation Second Injury Fund is not state property because it is not raised by taxation and is held in trust by custodian, State Treasurer); *Parsons v. South Dakota Lottery Comm'n*, 504 N.W.2d 593, 596 (S.D. 1993) (state lottery prize proceeds not public funds because money does not revert to state's general fund); *McIntosh v. Aubry*, 18 Cal. Rptr. 2d 680, 688-89 (Cal. Ct. App. 1993) (rent forbearance and inspection cost waivers are not public funds because they involve no payment of funds out of county coffers); *Wells v. Kentucky Local Correctional Facilities Constr. Auth.*, 730 S.W.2d 951, 955 (Ky. Ct. App. 1987) (construction bond proceeds do not constitute state monies because they are trust funds not in control of any state organization); *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 986 (N.M. 1974) (private donations to state university under control of Board of Regents are not subject to appropriation, therefore legislature has no power to limit use or disbursement of these funds).

¶ 36 According to Black's Law Dictionary, "public money" is "[r]evenue received from federal, state, and local governments from taxes, fees, fines, etc." *Black's Law Dictionary* 1005 (6th ed. 1990). As respondents note, however, no money *ever* enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money."

¶ 37 Petitioners suggest, however, that because taxpayer money *could* enter the treasury if it were not excluded by way of the tax credit, the state effectively controls and

exerts quasi-ownership over it. This expansive interpretation is fraught with problems. Indeed, under such reasoning all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature. That body has plenary power to set tax rates, categorize taxable income, and determine the type and amount of adjustments including deductions, exemptions, and credits. *See Tanque Verde Enters.*, 142 Ariz. at 539-40, 691 P.2d at 305-06 (recognizing the virtually unlimited authority of taxing bodies to set rates of taxation).

¶ 38 Equally problematic is the fact that petitioners' contention directly contradicts the decades-long acceptance of tax deductions for charitable contributions, including donations made directly to churches, religiously-affiliated schools and institutions. If credits constitute public funds, then so must other established tax policy equivalents like deductions and exemptions. Indeed, it seems to us that unless a constitutionally significant difference between credits and deductions can be demonstrated, petitioners' argument must fail. The dissent, recognizing this dilemma, attempts to construct a distinction based on an alleged disparity in the amount of benefits flowing from credits and deductions. That, however, would appear to be a matter of form rather than substance. In our judgment, neither the dissent nor petitioners have offered a principled way in which to address this contradition.

¶ 39 The calculation of personal income tax can be broken into several stages. First comes a determination of adjusted gross income, achieved by combining all sources of income and subtracting certain expenditures, such as contributions to individual retirement and medical savings accounts. *See* I.R.S. Form 1040, U.S. Individual Income Tax Return, Lines 7 through 32 (1997); Arizona Form 140, Resident Personal Income Tax Return, Lines

11 through 14 (1997). Next, taxpayers may take certain deductions and exemptions. The resulting subtotal is taxable income. *See* Arizona Form 140, Lines 15 through 26. This figure is then referenced to the tables for a determination of preliminary tax liability. *Id.* at Line 27. But the process does not end there. In fact, this point occurs about midway through the tax calculation and is, at most, a determination of *tentative*, not *actual*, tax liability. *See* Freeland, *supra*, at 969. The tax preparer may continue to reduce this amount by subtracting credits and other payments. Only after exhausting all of these opportunities does the taxpayer arrive at the bottom of the tax form and the inevitable—amount owed.

¶ 40 We do not accept the proposition, implicit in petitioners' argument, that the tax return's purpose is to return state money to taxpayers. For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined,[5] if not before. The tax on that amount would then instantly become public money. We believe that such a conclusion is both artificial and premature. It is far more reasonable to say that funds remain in the taxpayer's ownership *at least* until final calculation of the amount actually owed to the government, and upon which the state has a legal claim.[6]

¶ 41 We realize that this view may conflict with the "tax expenditure" approach advanced by the petitioners. Nevertheless, it is consistent with the traditional method

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[5] This occurs at Line 26, Arizona Form 140, Resident Personal Income Tax 1997. But we note that the amount finally owed by the taxpayer does not appear until Line 55.

[6] As previously noted, it can be argued that state ownership does not arise until funds actually enter the state's possession. However, we need not make that determination here.

of constitutional construction that accords to words their plain and simple meaning. The tax expenditure theory is of recent origin, having been first advanced by Professor Stanley Surrey during the late 1960s and early '70s. *See* Richard P. Davies, *A Flat Tax Without Bumpy Philanthropy: Decreasing the Impact of a "Low, Single Rate" on Individual Charitable Contributions*, 70 S. Cal. L. Rev. 1749, 1767 (1997). Proponents of the concept argue that deductions, credits, exemptions, and exclusions "constitute a form of hidden spending in the tax code and ought accordingly to be compared with equivalent non-tax spending programs." Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 Cornell L. Rev. 365, 377 n.30 (1998). This theory has been used by government as a tool for analyzing budgetary policy.[7] *See* Jean Harris, *Tax Expenditures: Concept and Oversight, in* Public Budgeting and Finance 385, 397 (Robert T. Golembiewski & Jack Rabin, eds., 4th rev. ed. 1997). It has not, however, been universally accepted as a doctrine of judicial decision-making.[8] Even the Supreme Court's treatment of the concept "changes depending on the substantive area of law being considered." Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 Wake Forest L. Rev. 855, 857 (1993). As the author notes:

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[7] Of course, as is true in any area of intellectual discourse, many other competing theories exist. In economics these days, three of the most prominent are the comprehensive tax base approach, optimal tax theory, and fiscal exchange or public choice theory. *See* Livingston, *supra*, at 381-83.

[8] Or even legislative decision-making, for that matter. "The grant of dollars through the tax system is not widely perceived in Congress as a disbursement of public funds." Allen Schick, *Congress and Money: Budgeting, Spending and Taxing* 550 (1980).

> [T]he Court has fully accepted the equivalence of direct spending programs and tax expenditures in the area of Free Speech rights, but it has not fully applied this concept in the context of Establishment Clause analysis. . . . [D]ifferent constitutional standards have been applied to direct spending programs and to tax expenditures that have the same economic effect. For example, the refusal to treat tax expenditures and direct spending programs in a consistent manner allows benefits to flow to religious institutions through the Internal Revenue Code when the same benefits would be struck down if distributed in a direct spending program.

Id. (citation omitted). In the same term of Court, now Chief Justice Rehnquist wrote both *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997 (1983), a "Free Speech" case, and *Mueller*, an "Establishment Clause" decision. We assume it is no accident that the tax expenditure thesis appears in the former opinion, but not in the latter. The Court has generally refused to recognize the tax expenditure concept where religion is involved.[9] *See* Joseph M. Kuznicki, Comment, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 Temp. L. Rev. 443, 473 (1988).

¶ 42 Modern economic theory, under some circumstances, may be helpful to our understanding. As has been shown, however, it does not necessarily govern constitutional interpretation. *But see Opinion of the Justices to the Senate*, 514 N.E.2d 353, 355 (Mass. 1987) (advisory opinion stating that "tax expenditures . . . are the

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[9] The dissent relies on a one-justice concurring opinion in arguing that a contrary view has been adopted by the Supreme Court. *Infra* at ¶ 143.

practical equivalent of direct government grants"). Moreover, while the plain language of the provisions now under consideration indicates that the framers opposed direct public funding of religion, including sectarian schools, we see no evidence of a similar concern for indirect benefits. One court has noted a similar distinction in the context of a state Freedom of Information Act (FOIA). *Sebastian County Chapter of the Am. Red Cross v. Weatherford*, 846 S.W.2d 641 (Ark. 1993). That court said:

> Refusal to read indirect government benefits or subsidies into the term "public funds" is not at odds with a liberal construction of FOIA. Were we to construe "public funds" to include an entirely separate and new category of government support, we would be amending the FOIA to expand its application significantly.

Id. at 644.

¶ 43 We also note with interest that Arizona's framers did not hesitate to extend tax-exempt status to churches. *See* Ariz. Const. art. IX § 2(2). In fact, they uniformly supported property tax exemptions for all "religious associations or institutions not used or held for profit." *Id.; see also The Records of the Arizona Constitutional Convention of 1910* 469-76, 850, 861, 891, 931, 933-34 (John S. Goff, ed. 1991) (hereinafter "*Records*"). Clearly, these exemptions constitute benefits to religious organizations, suggesting either that the framers did not regard such tax-saving measures as direct grants of "public money," or that their intent in prohibiting aid to religious institutions was not as all-encompassing as petitioners would have us hold.

"Appropriated For or Applied To"

¶ 44 An appropriation "set[s] aside from the public revenue . . . a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money." *Rios v. Symington*, 172 Ariz. 3, 6-7, 833 P.2d 20, 23-24 (1992) (quoting *Hunt v. Callaghan*, 32 Ariz. 235, 239, 257 P. 648, 649 (1927)). The power of appropriation belongs only to the legislature. *Prideaux v. Frohmiller*, 47 Ariz. 347, 357, 56 P.2d 628, 632 (1936).

¶ 45 Petitioners argue that the STO tax credit diverts to private schools funds that would otherwise be state revenue. This, they claim, has the same effect as an appropriation. We agree that *Community Council v. Jordan*, 102 Ariz. 448, 455, 432 P.2d 460, 467 (1967), rejected a narrow interpretation of "appropriations," finding the word to encompass executive and administrative contracts as well as disbursements. It does not follow, however, that reducing a taxpayer's liability is the equivalent of spending a certain sum of money. An appropriation earmarks funds from "the general revenue of the state" for an identified purpose or destination. *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 399, 218 P. 139, 145 (1923). Furthermore, we disagree with petitioners' characterization of this credit as public money or property within the meaning of the Arizona Constitution. Therefore, we are unwilling to hold that a proscribed appropriation or application occurs by operation of this statute.

Religious worship, exercise, aid, or establishment

¶ 46 Section 12 prohibits the use of public money for religious worship, exercise, instruction, or to support any religious establishment. Even if we were to agree that an

appropriation of public funds was implicated here, we would fail to see how the tax credit for donations to a student tuition organization violates this clause. The way in which an STO is limited, the range of choices reserved to taxpayers, parents, and children, the neutrality built into the system—all lead us to conclude that benefits to religious schools are sufficiently attenuated to foreclose a constitutional breach.

¶ 47 As discussed earlier, safeguards built into the statute ensure that the benefits accruing from this tax credit fall generally to taxpayers making the donation, to families receiving assistance in sending children to schools of their choice, and to the students themselves. *See* A.R.S. 43-1089(E)(2). Moreover, to qualify for § 501(c)(3) tax treatment, the STO must supply the Internal Revenue Service with copies of the scholarship application and program brochures, rules of eligibility, selection criteria and scholarship processing procedures. I.R.S. Publication 557, at 19 (Rev. May 1997).

¶ 48 The dissent expresses concern over the prospect that an Arizona taxpayer might be able to make a profit by taking both the state tuition credit and a charitable deduction on the federal return. *Infra* at ¶ 148 n.17. Whether or not such a maneuver would be possible or allowable is a policy matter for the legislature and the taxing authorities to address, rather than this court. It in no way changes our constitutional analysis. Similarly, our role is not to make judgments about the overall wisdom of the tax credit before us. That obligation falls to the other branches of government. We hold that the school tax credit does not violate article II, § 12 of the Arizona Constitution.

¶ 49 As previously indicated, article IX, § 10 states that "[n]o tax shall be laid or appropriation of any public

money made in aid of any church, or private or sectarian school, or any public service corporation." It applies to all private schools, whether sectarian or not.

¶ 50 We have already concluded that this tax credit is not an appropriation of public money. Likewise, no tax has been laid here. To the contrary, this measure *reduces* the tax liability of those choosing to donate to STOs. We cannot say that the legislature has somehow imposed a tax by declining to collect potential revenue from its citizens. Nor does this credit amount to the laying of a tax by causing an increase in the tax liability of those not taking advantage of it. Such a construction tortures the plain meaning of the constitutional text. In addition, if we were to conclude that this credit amounts to the laying of a tax, we would be hard pressed to identify the citizens on whom it is assessed. Because we see no constitutional difference between a credit and a deduction, we would also be forced to rule that deductions for charitable contributions to private schools were unconstitutional because they too, would amount to the laying of a tax. This we decline to do. We find no violation of article IX, § 10 of the Arizona Constitution.

Anti-Gift Clause

¶ 51 Under article IX, § 7, the state shall not "give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." We have upheld giving when the state action served a public purpose and adequate consideration was provided for the public benefit conferred. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348-49, 687 P.2d 354, 356-57 (1984) (holding that state payment of portion of teacher association president's salary did not violate anti-gift clause).

¶ 52 This constitutional provision was historically intended to protect against the "extravagant dissipation of public funds" by government in subsidizing private enterprises such as railroad and canal building in the guise of "public interest." *State v. Northwestern Mutual Ins. Co.*, 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959) (citation omitted). Such "evils" do not exist here. Neither do we agree with petitioners that a tax credit amounts to a "gift." One cannot make a gift of something that one does not own.

Framers' Intent

¶ 53 Petitioners claim that Arizona's founders intended to implement a much more stringent prohibition against aid to religion than did their federal counterparts. They offer an historical analysis in support of this position. The dissent, despite acknowledging the "explicit text" of the constitution, *infra* at ¶ 73, advances a similar argument. We are persuaded, however, that our textual analysis is sufficient to decide the issues presented here.

¶ 54 "We interpret constitutional provisions by examining the text and, *where necessary*, history in an attempt to determine the framers' intent." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 12, 730 P.2d 186, 189 (1986) (emphasis added). Even if we agreed that an historical search for the framers' intent was appropriate, we would not conclude that the statute in question violates the Arizona Constitution. There is sparse recorded evidence respecting the clauses at issue here, and any historical analysis is necessarily filled with speculation. *See* Thomas E. Sheridan, *Arizona: A History* 385 (1995) ("There is also no comprehensive history of the Arizona constitutional convention or the political milieu out of which it arose."). The verbatim transcript of the 1910 constitutional convention reveals little discussion on the

convention floor about the religion clauses. *See Records, supra*, at 660, 894, 940. "In reading through the proceedings one is impressed by the fact that major issues were often glossed over with no debate or discussion." *Records, supra*, at iv. Our dissenting colleague has himself noted that "[t]his court has properly been skeptical of some approaches to divining legislative intent." *Business Realty v. Maricopa County*, 181 Ariz. 551, 558, 892 P.2d 1340, 1347 (1995). We believe even greater skepticism is called for in "divining" the intent of language drafted almost 90 years ago and about which so little has been recorded or preserved. Thus, we cannot subscribe with any confidence to the "framers' indisputable desire to exceed the federal requirements" of the Establishment Clause. *Infra* at ¶ 130.

¶ 55 Moreover, the boundaries limiting judicial interpretation of framers' intent are amorphous and "subject to continuous adjustment." Terrance Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1033 (1981). A provision's meaning is necessarily conditioned by contemporary understandings of the drafters' intentions. *Id.* at 1065. In practice, courts engaging in the search for original intent often look for the "larger purposes" to which the constitution gives expression, *id.* at 1037, mediating differences between the historical document and the need to accommodate changing circumstances and the passage of time. *See id.* at 1036. Further, "historical analysis does not suggest that the original intent of the drafters—an uncertain concept at best—governs or controls the interpretation of those clauses today; it merely recognizes that the history of a constitutional provision influences future interpretations to some degree." Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establish-*

ment Clauses in the Washington State Constitution, 15 Hastings Const. L.Q. 451, 451 (1988).

¶ 56 For example, in *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954), the Supreme Court considered the framers' intent in adopting the Fourteenth Amendment, including the political climate of the time and long-standing practices of racial segregation. *Id.* at 489-90, 74 S. Ct. at 688-89. The Court stated:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93, 74 S. Ct. at 691.

¶ 57 We have said as much ourselves in the very context of Arizona's religion clauses:

> The state constitutional provisions must be viewed in light of *contemporaneous assumptions* concerning the appropriate sphere of action for each institution. History is clear that as a state evolves from one decade to another the role of the state "transcends traditional boundaries and assumes new dimensions" necessitating a revision of the idiomatic meaning of "separation" to align it with "the new realities if original purposes and expectations are to be realized."

Community Council, 102 Ariz. at 451-52, 432 P.2d at 463-64 (quoting Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 Harv. L. Rev. 1381, 1383 (1967)) (emphasis added).

¶ 58 This court long ago rejected "the strict view that in essence no public monies may be channeled through a religious organization for any purpose whatsoever without, in fact, aiding that church contrary to constitutional mandate." *Community Council*, 102 Ariz. at 451, 432 P.2d at 463. Instead, we said:

> The prohibitions against the use of public assets for religious purposes were included in the Arizona Constitution to provide for the historical doctrine of separation of church and state, the thrust of which was to insure that there would be no state supported religious institutions thus precluding governmental preference and favoritism of one or more churches.

Id. In fact, as we review Arizona history and scan the present day horizon, it is apparent that religion has never been hermetically sealed off from other institutions in this state, or the nation. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally."). Arizona's motto, *Ditat Deus*, means "God enriches." *See* Ariz. Const. art. XXII, § 20. And even though, as we have noted, the transcripts of our constitutional convention reveal almost nothing about the clauses in question, they clearly reflect religion as part of the proceedings. Each day's session was opened by a prayer from the convention chaplain, Rev. Seaborn Crutchfield. Indeed, to this day Arizona legislative sessions begin with a prayer delivered by the Chaplain of the Day. The constitutional delegates also negotiated over whether the preamble should refer to "Almighty God," the "Supreme Being," or "Almighty God for Liberty." *Records, supra*, at 41, 77, 82-83. They ultimately agreed that the preamble should read, "We, the people of the State of Arizona,

grateful to Almighty God for our liberties, do ordain this Constitution." *Id.* at 1399.

¶ 59 In a more contemporary vein, tax codes, both state and federal, permit churches and other religious institutions to acquire tax-free status and allow deductions for contributions made directly to such entities. *See* 26 U.S.C. §§ 501(a), (c)(3), 170(a), (c)(2)(B); A.R.S. §§ 43-1201, 43-1042. "[T]he doctrine of separation of church and state does not include the doctrine of total nonrecognition of the church by the state and of the state by the church." *Community Council*, 102 Ariz. at 451, 432 P.2d at 463.

¶ 60 Clearly, the state constitution forbids the creation of a state church or religion. It also guarantees freedom of worship and belief by demanding absolute neutrality in the treatment of religious groups. "The State is mandated by [article II, § 12] to be absolutely impartial when it comes to the question of religious preference, and public money or property may not be used to promote or favor any particular religious sect or denomination or religion generally." *Pratt v. Arizona Bd. of Regents*, 110 Ariz. 466, 468, 520 P.2d 514, 516 (1974). There is no evidence, however, that the framers intended to divorce completely any hint of religion from all conceivably state-related functions, nor would such a goal be realistically attainable in today's world.

¶ 61 We do know that the framers "took education seriously," as evidenced by their creation of a separate constitutional article on the subject. John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 96 (1988). They expressed the belief that educated citizens are vital to a free and united society. *See Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 179 Ariz. 233, 239, 877 P.2d 806, 812 (1994). Thus, Arizona compels

its children to attend school—public, private, or home school. *See* A.R.S. § 15-802(A). We must respect the framers' intent in this area as we decide the present issue.

¶ 62 One of the most enviable attributes of our constitutional form of government is its adaptability to change and innovation. As stated in *Community Council*, we must view constitutional provisions "in light of contemporaneous assumptions." 102 Ariz. at 451, 432 P.2d at 463. Today's reality is that primary and secondary education systems are facing nationwide reform. Many states are exploring alternatives to traditional public education —from charter schools to private school vouchers. *See* Jo Ann Bodemer, Note, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid from the Lemon Test*, 70 St. John's L. Rev. 273, 275-77 (1996). In 1994, Arizona authorized the creation of charter schools supported by public funds. *See* A.R.S. §§ 15-181 through 15-189.02. In doing so, the legislature hoped to encourage the development of educational settings that would invigorate learning, improve academic achievement, and provide additional choices for parents and children. *See* A.R.S. § 15-181(A). It has now adopted a tax policy presumptively intended to further the same or similar goals. The pursuit of such a strategy falls squarely within the legislature's prerogative.

¶ 63 Some might argue that the statute in question runs counter to these goals by encouraging more students to attend private schools, thereby weakening the state's public school system. But that is a matter for the legislature, as policy maker, to debate and decide. It is not for us to pass on the wisdom of this or any other social policy. Concerning ourselves only with matters of constitutionality, we have concluded that the religion clauses of the Arizona Constitution do not invalidate this attempt to

keep pace with changing economic conditions and societal goals.

Blaine Amendment and Washington State Constitution

¶ 64 The dissent relies to a great extent on external, peripheral sources such as the Blaine amendment, introduced in Congress more than 100 years ago, and the Washington State Constitution. These do not control our decision today.

¶ 65 In 1875, Maine Congressman James Blaine introduced a Constitutional amendment prohibiting the states from granting public funds or taxes for the benefit of any religious sect or denomination. Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113, 144 (1996). The bill failed to muster enough votes for passage, but was later resurrected in a number of state constitutions. *Id.* at 146-47.

¶ 66 The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing "Catholic menace." Viteritti, *supra*, at 146; *see also* Stephen K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 54 (1992). Its supporters were neither shy nor secretive about their motives. As one national publication which supported the measure wrote:

> Mr. Blaine did, indeed bring forward . . . a Constitutional amendment directed against the Catholics, but the anti-Catholic excitement was, as every one knows now, a mere flurry; and all that Mr. Blaine means to do or can do with his amendment is, not to pass it but to use it in the campaign to catch anti-Catholic votes.

Green, *supra*, at 54 (quoting *The Nation*, Mar. 16, 1876, at 173). Other contemporary sources labeled the amendment part of a plan to "institute a general war against the Catholic Church." Green, *supra*, at 44 (quoting *The New York Tribune*, July 8, 1875, at 4). While such efforts were unsuccessful at the federal level, the jingoist banner persisted in some states. By 1890, twenty-nine states had incorporated at least some language reminiscent of the Blaine amendment in their own constitutions. Viteritti, *supra*, at 147. There is, however, no recorded history directly linking the amendment with Arizona's constitutional convention. In our judgment, it requires significant speculation to discern such a connection. In any event, we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.

¶ 67 The Arizona constitutional convention consumed a mere two months from beginning to end. Leshy, *supra*, at 40-41. As one of the last states admitted to the Union, Arizona borrowed much from those that preceded it. *See* Leshy, *supra*, at 5. Language was lifted from the constitutions of Washington, Oregon, Texas, and Oklahoma, to name a few. *See, e.g., Records, supra*, at 167, 179, 182, 660.

¶ 68 On several occasions we have acknowledged similarities between provisions of the Washington Constitution and our own. *See Schultz v. City of Phoenix*, 18 Ariz. 35, 42, 156 P. 75, 77 (1916); *Faires v. Frohmiller*, 49 Ariz. 366, 372, 67 P.2d 470, 472 (1937). Nevertheless, while Washington's judicial decisions may prove useful, they certainly do not control Arizona law. We alone must decide how persuasive the legal opinions of other jurisdictions will be to our holdings. *See Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 167-68, 370 P.2d 652, 655 (1962) (noting that while a certain provision

of Washington's constitution was "identical" to Arizona's, "it becomes apparent that the same meaning and effect was not intended by its adoption"). At least thirty states have constitutions that contain provisions similar to one or both of our religion clauses.[10] To our knowledge, none of these jurisdictions has faced the precise issue before us today.

¶ 69 The dissent points to three Washington State cases holding that state money could not be used to provide financial assistance to students. *See Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (direct financial aid for visually impaired student to pursue religious studies at private bible college); *Washington State Higher Educ. Assistance Auth. v. Graham*, 529 P.2d 1051 (Wash. 1974) (state agency purchasing and making loans to students in post-secondary educational institutions); *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973) (direct financial assistance to students attending both public and private elementary and high schools, as well as private colleges and universities). In each instance, the Washington Supreme Court found that the program violated the state's constitutional prohibitions against using public money to benefit sectarian schools. While these cases are informative, they are also distinguishable on

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[10] *See* Alaska Const. art. VII, § 1; Cal. Const. art. XVI, § 5; Colo. Const. art. IX, § 7; Del. Const. art. X, § 3; Fla. Const. art. I, § 3; Ga. Const. art. I, § 2, para. 7; Haw Const. art. X, § 1; Idaho Const. art. IX, § 5; Ill. Const. art. X, § 3; Ind. Const. art. I, § 6; Mass. Const. amend. art. XVIII, § 2; Mich. Const. art. I, § 4; Minn. Const. art. I, § 16; Miss. Const. art. VIII, § 208; Mo. Const. art. IX, § 8; Mont. Const. art. X, § 6; Neb. Const. art. VII, § 11; N.H. Const. Pt. II, art. 83; N.Y. Const. art. XI, § 3; Okla. Const. art. II, § 5; Or. Const. art. I, § 5; Pa. Const. art. III, § 29; S.C. Const. art. XI, § 4; S.D. Const. art VI, § 3; Tex. Const. art. I, § 7; Utah Const. arts. I, § 4 and X, § 9; Va. Const. art. IV, § 16; Wash. Const. art. I, § 11; Wis. Const. art. I, § 18; Wyo. Const. art. I, § 19.

their facts. In each instance, direct appropriations of state monies were involved.

¶ 70 It is also important to recall that Arizona and Washington were founded under markedly different historical circumstances, and their subsequent development reflects those differences. It is difficult, if not impossible, to apply the intent of one group of constitutional framers to another operating at a different time and place. Thus, we must cautiously view the constitutional decisions of other state courts as we attempt to place our own founding document in historical perspective. As the now Chief Justice of the Wisconsin Supreme Court has so aptly said in describing her approach to constitutional interpretation: "I look at the peculiarities of my state—its land, its industry, its people, its history." Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951, 965 (1982).

¶ 71 Washington State was carved from the British Northwest Territories, controlled by the large fur trading companies. Climate, geography and the abundance of natural resources—timber, fish, and water—are reflected in myriad ways in that state's governmental institutions and sources of economic power. The trans-Pacific influences are readily apparent to anyone who walks Seattle's waterfront or Chinatown. Arizona, in contrast, emerged from an entirely different orientation reaching from Spain and Mexico. Our founding documents are the Treaty of Guadalupe Hidalgo and the Gadsden Purchase. Our first settlers came looking for gold, silver, and copper, or range land for cattle. The economic, political, and social ramifications of the lack of a resource such as water can hardly be overestimated. In such vastly dissimilar milieus, even identical words can carry with them a freight of startlingly different meaning.

CONCLUSION

¶ 72 We hold that the tuition tax credit is a neutral adjustment mechanism for equalizing tax burdens and encouraging educational expenditures. Petitioners have failed to demonstrate that it violates either the Federal or the Arizona Constitution. We find it a valid exercise of legislative prerogative. Relief denied.

THOMAS A. ZLAKET
Chief Justice

CONCURRING:

CHARLES E. JONES
Vice Chief Justice

FREDERICK J. MARTONE
Justice

FELDMAN, Justice, dissenting

¶ 73 Believing A.R.S. § 43-1089 (the Arizona tax credit) violates the explicit text of our state constitution and the Establishment Clause of the federal constitution, I respectfully dissent.

¶ 74 Today's decision upholding the use of a tax credit to support private and sectarian schools is unfortunate in several respects. First, the court allows the government to provide assistance to private, predominantly sectarian schools despite at clear prohibition in article II, § 12 and article IX, § 10 of the Arizona Constitution. Next, it overlooks the historical background of these sections and consequently ignores the framers' plain intent. It then confuses non-neutral, direct tax credits with neutral deduc-

tions and benefits when there is, in fact, a clear difference in their constitutionality. Fourth, it errs in suggesting that funds derived from tax credits are not public funds. Finally, because the statute permits uncontrolled, government-reimbursed grants to private, primarily religious institutions and denies similar grants to public institutions, it directly subsidizes religious education and thus violates the Establishment Clause of the First Amendment to the United States Constitution.

THE ARIZONA TAX CREDIT PLAN

¶ 75 This case does not deal with or question reference to the deity in the state's seal or preamble to the constitution. Nor does it deal with public or charter schools, voucher programs providing educational aid to low-income families, or even charitable contributions. Constitutionality in this case, as in most, turns on analysis of statutory purpose and effect. The Arizona tax credit does not survive this analysis. The tax credit statute permits any taxpayer, not just parents of school children, a $500 direct credit against taxes, but only to reimburse so-called contributions to school tuition organizations (STOs) supporting nongovernmental schools. At least seventy-two percent of these schools are sectarian. *See* Coffey, A Survey of Arizona Private Schools (1993) (Appendix I of Intervenor Lisa Graham Keegan, Arizona Superintendent of Public Instruction). Contributions to public schools will not qualify for the credit because a "qualified school" is limited to "a *nongovernmental* primary or secondary school" of the "parents' choice." § 43-1089(E)(1), (2) (emphasis added).

¶ 76 It is true the public school system is tuition-free and students at those schools therefore need no scholarships or tuition grants, but provisions could have been made for a tax credit for contributions supporting the

educational mission of the public school system. This would have put the state's private, sectarian, and public schools on the same basis. But § 43-1089.01 allows only a maximum $200 credit for contributions to public schools and is available only to reimburse fees paid for extracurricular activities. The majority intimates that comparison of the two school credits is "unnecessary" to the analysis because the costs of public school establishment and operation are already borne by the state. Slip op. at ¶ 25. The problem with that argument is apparent from reading our own opinions on the deficiencies of state financing of public schools and the underfinanced and unfilled educational missions of those schools. *See, e.g., Roosevelt Elem. Sch. Dist. v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994). If we are to consider equality or neutrality of the two credits, we must bear in mind that public schools, like private schools, need assistance to perform their educational mission.

¶ 77 Notably, the private school tax credit does not restrict use of the grant money to secular purposes. Thus, the recipient schools may use the government's subsidy for direct support of sectarian education or observance, the very thing both our state and federal constitutions forbid. Further, while prohibiting the STOs from making grants to "only students of one school," the statute does not prevent an STO from directing all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect. § 43-1089(E)(2). In fact, a group of taxpayers who subscribe to a particular religion may form an STO that will support only schools of that religion. Worse, in defining the schools qualified to receive STO grants, the Legislature excluded schools that "discriminate on the basis of race, color, sex, handicap, familial status, or national origin" but not those that limit admission on the basis of religious adherence, pref-

erence, or observance. § 43-1089(E)(1). Indeed, STOs are to use the grant money to "allow" children to "attend any qualified school of their parents' choice." § 43-1089(E)(2). Thus, nothing forbids an STO from limiting its grants or scholarships to students who adhere to a particular religion and will participate in the required religious observance.

¶ 78 There is, of course, nothing bad and everything good in private support for religious schools and sectarian education. But both state and federal constitutions forbid using the power of government to provide the type of support encompassed by Arizona's statute. I turn first to the federal constitution.

THE FEDERAL CONSTITUTION

¶ 79 The majority believes the standard of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), provides an appropriate framework for its review of the constitutionality of § 43-1089. Slip op. at ¶ 5. The second prong of *Lemon*'s three-part test requires that a statute be "neutral on its face and in its application" and not have the "primary effect" of advancing sectarian aims of nonpublic schools. *See Mueller v. Allen*, 463 U.S. 388, 392, 103 S.Ct. 3062, 3065 (1983); *see also Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788, 93 S.Ct. 2955, 2973 (1973). To comply, "aid to sectarian schools must be restricted to ensure that it may not be used to further the religious mission of those [religious] schools." *See Mueller*, 463 U.S. at 406, 103 S.Ct. at 3073 (citing *Wolman v. Walter*, 433 U.S. 229, 250-51, 97 S.Ct. 2593, 2606-07 (1977)). I believe § 43-1089 fails this analysis.

A. The primary effect of A.R.S. § 43-1089 is not neutral

¶ 80 The Establishment Clause issue turns on the United States Supreme Court's opinions in *Nyquist* and *Mueller*. Arizona's tax credit contains each of the factors that led the Court to declare the credit unconstitutional in *Nyquist* and none of the provisions that saved the deduction in *Mueller*.

¶ 81 The New York plan considered in *Nyquist* involved a tuition grant program for low income families, together with a tuition tax deduction program that varied by income level. Both plans were limited to families whose children attended private schools; neither program was available for parents of children who attended public schools.

¶ 82 The Court noted that the private schools were predominantly religious and concluded that both tuition aid programs violated the Establishment Clause.

> [When] grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.

413 U.S. at 786, 93 S.Ct. at 2972.

¶ 83 In *Nyquist*, New York issued vouchers redeemable only at private schools. Arizona's tax credit is available only for private school contributions. The result is state support of private, mostly sectarian schools. And contrary to the majority's assertion, it is not affected even though the "final destination" of the money is chosen by

"individual parents," not the state. Slip op. at ¶ 19. In New York, the funds went first to the parents and then to the school of their choice. *Id.* at 785-86, 93 S.Ct. at 2972. Similarly, under the Arizona plan, the money goes first to the STO and then to the school of its choice. In a footnote, the *Nyquist* Court made it clear that the result might be different if the scholarships and tuition grants were neutrally "available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 782 n.38, 93 S.Ct. at 2970 n.38. Arizona's tax credit, however, may be used only at private, mostly sectarian schools.

¶ 84 In *Mueller*, the Court upheld a Minnesota law allowing a deduction, in part because it was "available for educational expenses incurred by all parents including those whose children attend public schools." Making the benefit available to this neutral and "broad class" is an "important index of secular effect." 463 U.S. at 397, 103 S.Ct. at 3068 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274, 102 S.Ct. 269, 277 (1981)). The Court said the Establishment Clause does "not encompass the sort of attenuated financial benefit . . . that eventually flows to parochial schools from the neutrally available tax benefit at issue . . . ." *Id.* at 400, 103 S.Ct. at 3070. Indeed, the *Mueller* Court described *Nyquist*'s unconstitutional, nonneutral, private school program in words directly applicable to the Arizona: "thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children attending private schools," the majority of which were sectarian. *Id.* at 394, 103 S.Ct. at 3066.

¶ 85 This case is very like *Nyquist* and very unlike *Mueller*. The Arizona tax credit is available only to those who choose to support private, predominantly religious schools. Those who wish to contribute to public schools are allowed only a $200 credit, and their contri-

butions can be used only to reimburse fees paid for extracurricular activities. Thus, the tax credit does not offer the same or even similar benefits to all taxpayers, is not neutral, and the "money involved represents a charge made upon the state for the purpose of religious education." *Nyquist*, 413 U.S. at 791, 93 S.Ct. at 2974.

B. The tax credit is not one of a group of permissible, generally available tax benefits

¶ 86 The majority argues that "both credits and deductions . . . are intended to serve policy goals, and clearly act to induce 'socially beneficial behavior' by taxpayers." Slip op. at ¶ 12 (quoting Elizabeth A. Baergen, Note, *Tuition Tax Deductions and Credits in Light of Mueller v. Allen*, 31 WAYNE L. REV. 157, 173 (1984)). The court goes on to say there are "mechanical differences between deductions and credits," but "that these distinctions are [not] constitutionally significant." *Id.*

¶ 87 I fear the court conflates personal philanthropy with government grants. The difference is one of substance, not mechanics or labels. Unlike deductions allowed for general charitable giving, the tax credit provides a dollar-for-dollar reimbursement available only to those who support our primarily sectarian private school system. It is everything *Nyquist* held unconstitutional—a direct stipend that has the primary effect of advancing religion by tuition grants to religious schools. *Nyquist*, 413 U.S. at 779-80, 791, 93 S.Ct. at 2969, 2974-75.

¶ 88 The Court sees this quite benignly, as just one of the "tools by which government can ameliorate the tax burden while implementing social and economic goals." Slip op. at ¶ 15. But the Establishment Clause forbids the government from promoting religious education by special benefits unavailable for general, charitable giving.

This, of course, includes tax subsidies available only for religious education. *Nyquist*, 413 U.S. at 782-83, 93 S.Ct. at 2970-71; *see also Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 487-88, 106 S.Ct. 748, 751 (1986) (discussing impermissible direct subsidies to religious education). As the Court recognized in *Nyquist*'s companion case, a statute that implicates the Establishment Clause cannot "*single*[] *out a class of its citizens for a special economic benefit.*" *Sloan v. Lemon*, 413 U.S. 825, 832, 93 S.Ct. 2982, 2986 (1973). When such a benefit acts as a tuition subsidy that helps only children attending primarily sectarian schools, it supports religiously oriented institutions. *Id.*

¶ 89 Thus, in arguing that the Arizona tax credit is but one of many tax credits provided by the Arizona Legislature, the court overlooks this crucial distinction: the Establishment Clause is not implicated when the Legislature grants tax credits to support socially beneficial programs such as environmental cleanups or assistance to the working poor. Slip op. at ¶ 15; *see also* §§ 43-1086, 43-1088. If it wished, the Legislature could, without constitutional conflict, make direct appropriations for these purposes. But credits that support religious education implicate the religion clauses of both the state and federal constitutions. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 218-19, 68 S.Ct. 461, 468-69 (1948). And when the tax credit is available only for support of private, predominantly religious schools, the Establishment Clause is not just implicated, it is violated. *Nyquist*, 413 U.S. at 793, 93 S.Ct. at 2975.

C. There is no real private choice—religious institutions primarily benefit

¶ 90 The court argues that the decision to contribute is purely a matter of individual choice and that religious

institutions are only "incidental beneficiaries." Slip op. at ¶ 26. Under the provision upheld in *Mueller*, religious schools benefitted only as a result of true choice made among a *wide selection of alternatives*, both public and private. 463 U.S. at 397-99, 103 S.Ct. at 3068-69. Under the Arizona plan, there is no real choice—one may contribute up to $500 to support private schools or pay the same amount to the Arizona Department of Revenue. In reality, this is not a choice but government action designed to induce taxpayers to direct financial support to predominantly religious schools. The majority seems to argue that the "primary beneficiaries" of STO contributions are "scholarship recipients," not the schools. Slip op. at ¶21 n.4. No doubt the STOs, the students, the schools, and those taxpayers wishing to support private schools are all beneficiaries. The question, however, is not who is a primary beneficiary but whether the state may subsidize private, secular education, thus benefitting any or all of these beneficiaries.

¶ 91 The Supreme Court has assessed a law's effect by examining the character of the institutions benefited to determine whether they are predominantly religious. *See, e.g., Meek v. Pittenger*, 421 U.S. 349, 363-64, 95 S.Ct. 1753, 1762-63 (1975). As the majority indicates, the *Mueller* Court voiced concern over whether statistics could be used to determine whether legislation will have a predominantly religious effect. 463 U.S. at 401, 103 S.Ct. at 3070. But there is a big distinction between *Mueller* and the present case. Because the *Mueller* statute was facially neutral and available for support of both public and private schools, the Court chose not to examine statistics showing which taxpayers—those deducting for private school expenses or those deducting for public school expenses—actually took advantage of the tax benefit. *Id.* "We would be loath to adopt a rule grounding

the constitutionality of a *facially neutral* law on annual reports reciting the extent of various classes of private citizens who claimed benefits under the law." *Id.* (emphasis added).

¶ 92 The Arizona statute is not facially neutral because its beneficiaries are supporters of Arizona's private schools, not parents who may take a deduction for either public or private school expenses. The Arizona tax credit, unlike that in *Mueller*, is not limited to helping all parents with school children but is available only to taxpayers willing to direct the money to private schools. When the benefit can flow only to private schools, the court must determine what percentage of those private schools is sectarian. This is the precise statistic the Court examined in *Meek*, 421 U.S. at 364, 95 S.Ct. at 1762-63 (system seventy-five percent sectarian); *Nyquist*, 413 U.S. at 757, 93 S.Ct. at 2957 (eighty-five percent sectarian); *Sloan*, 413 U.S. at 830, 93 S.Ct. at 2985-86 (ninety percent sectarian); and *Lemon*, 403 U.S. at 610, 91 S.Ct. at 2110 (ninety-five percent sectarian).

¶ 93 In *Meek*, the Court described Pennsylvania's seventy-five percent sectarian private school system as "predominantly religious." 421 U.S. at 363, 95 S.Ct. at 1762. This phrase is, of course, applicable to Arizona's private, seventy-two percent sectarian schools. Thus, "it simply defies reason to say that such a statute does not aid sectarian schools." *Kosydar v. Wolman*, 353 F.Supp. 744, 762 (S.D. Ohio 1972), *aff'd sub nom. Grit v. Wolman*, 413 U.S. 901, 93 S.Ct. 3062 (1973). Contrary to the majority's assertion, the statute promotes support of religious schools. It does this without prohibiting use for sectarian instruction, thereby allowing direct state subsidy of religious instruction and observance.

D. A.R.S. § 43-1089 places no limitation on use of the tuition grants

¶ 94 The Establishment Clause is violated when state aid is directed exclusively to private, mostly sectarian schools *without limitation* on use. *See Nyquist*, 413 U.S. at 780, 93 S.Ct. at 2969; *Sloan*, 413 U.S. at 829, 93 S.Ct. at 2985; *Lemon*, 403 U.S. at 616-17, 91 S.Ct. at 2113-14; *see also Meek*, 421 U.S. at 365-66, 95 S.Ct. at 1763-64. The *Nyquist* Court held that "[*i*]*n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.*" 413 U.S. at 780, 93 S.Ct. at 2969 (emphasis added). *Mueller* did not disapprove that statement. In fact the Minnesota statute, unlike Arizona's, disallowed deductions for instructional books used to teach or "inculcate religious belief, tenets, doctrine, or worship." *Mueller*, 463 U.S. at 401, 103 S.Ct. at 3062. As the majority notes, *Mueller* can be construed to allow some types of unrestricted aid when neutrally available to both public and private schools, but the Court has never permitted unrestricted aid in a program, like Arizona's, available only to private, mostly sectarian schools. Instead, it has required mechanisms to restrict the aid to secular uses. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-10, at 1226 (2d ed. 1988). Those mechanisms are absent from the Arizona statute.

E. The Arizona tax credit, unrestricted as to use, exceeds the boundaries set in the United States Supreme Court's Establishment Clause jurisprudence

¶ 95 Because Arizona's tax credit statute does not require that grant use be restricted to the secular aspects of education, the STOs' grants to private schools may be

used in any manner the recipient school wishes. Nor does the statute prevent an STO from directing all of its grant money to schools that restrict enrollment or education to adherents of a particular religion or sect. Moreover, there is no limit on the dollar amount the STO can give to a school on behalf of a student. Thus, an STO could pool several contributions and then pay the full tuition for any student, group of students, or for that matter, all students in any group of schools of a single religious faith.

¶ 96 None of the Court's cases permits such a government subsidy. The majority incorrectly relies on a number of cases that have built on *Mueller*. In *Witters*, for example, the benefit was used to provide vocational rehabilitation services for a blind student at a Christian college, but the benefit was equally available to any eligible student at any school, public or private. 474 U.S. at 488, 106 S.Ct. at 752.

¶ 97 In *Zobrest v. Catalina Foothills School District*, the Court approved a school district's provision of sign language interpreters under a federal act benefitting individuals with disabilities. 509 U.S. 1, 113 S.Ct. 2462 (1993). Thus, interpreters were available for deaf students attending classes at a Catholic high school, but also for students attending public schools. The Court held that the government had offered "a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion' . . . ." *Id.* at 10, 113 S.Ct. at 2467.

¶ 98 In *Agostini v. Felton*, the Court held that grants for general remedial services available to aid the educational, nonreligious function of religious and public schools are not *per se* invalid. 521 U.S. 203, ——, 117 S.Ct. 1997, 2010 (1997). The Court relied on the principles

established in *Nyquist* and *Mueller*: neutral government benefits do not violate the Establishment Clause when provided without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions supported. *Id.* at ——, 117 S.Ct. at 2011. The Arizona program, however, is available only to private schools and may be used for sectarian instruction and observance.

¶ 99 The majority today puts great reliance on the Wisconsin case of *Jackson v. Benson*, 578 N.W.2d 602, *cert. denied*, 119 S.Ct. 466 (1998). Slip op. at ¶ 18. Even if we are to assume that *Jackson* will eventually withstand Establishment Clause analysis, it does not support the majority's result because the Wisconsin program is quite different from Arizona's. First, the Wisconsin statute contains an "opt-out" provision by which students may be excused from the religious aspects of sectarian education. Second, Wisconsin requires schools receiving grants to admit applicants without regard to religious/nonreligious preference. Third, Wisconsin limits support to the private institution's educational programs. Finally, Wisconsin's program is designed to help low income families send their children to private schools.

¶ 100 Arizona's statute, on the other hand, contains no religious instruction opt-out provision, appears to permit religious discrimination, permits funding of religious observance, and makes the tax credit available to all taxpayers, those who have children in school and those who do not, the rich and the poor. Further, our statute makes no limitation on the amount of funding a school can receive from an STO for a particular student. Wisconsin, in short, has made some attempt, successful or not, to limit the use of state subsidies for religious instruction and ceremony. Arizona's program, on the other hand, will inevitably and primarily benefit religious observance and instruction.

¶ 101 The majority has cited Professor Baergen's article for several points. *See, e.g.*, Slip op. at ¶¶ 12, 15. Professor Baergen's conclusion, however, provides a good summation for the Establishment Clause issue:

> Mueller v. Allen held that facially neutral income tax deductions for educational expenses are not an unconstitutional infringement of the Establishment Clause. This note suggests that tax credit provisions, which could entirely subsidize private sectarian education, should be carefully scrutinized for an unconstitutional legislative purpose. Such an *impermissible purpose should be found if the credit is limited to private educational expenses* or if the credit gives such an unbalanced benefit to the parents of private school children that it is clearly intended as a tax incentive to subsidize private, primarily sectarian education. Likewise, *a credit limited to private school expenses would suffer an unconstitutional primary effect of advancing religious education, unmitigated by the deference shown by courts to true legislative tax enactments* [*such as deductions*] which equitably allocate tax burdens based upon a definition of net income. Moreover, tax credit provisions which are facially neutral but only supply a [*de minimis*] benefit to parents of public school children should be subject to statistical analysis to determine the true beneficiaries of the program and expose the facial neutrality as a facade.

Baergen, *supra*, 31 WAYNE L. REV. at 184 (emphasis added).

THE STATE CONSTITUTION

A. Historical background

¶ 102 The Arizona tax credit violates the state constitution's prohibition that "[n]o public money . . . shall be

applied to any religious worship, exercise, or instruction or to the support of any religious establishment." Article II, § 12. It also violates the prohibition on laying any "tax . . . in aid of any . . . private or sectarian school . . . ." Article IX, § 10. The text is clear and unambiguous. Thus, the case should have ended there. But for those who somehow find ambiguity in the quoted words, we can turn to the intent of those who wrote our constitution.

¶ 103 The majority says we should use great "skepticism" in divining the framers' intent. Slip op. at ¶ 54. We are to look instead for the framers' "larger purposes." Slip op. at ¶ 55. But this court has always prided itself on its devotion to text and framers' intent. *E.g., Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990) ("The cardinal rule . . . is to follow the text and the intent of the framers . . . ."). Putting aside the explicit text, I believe the framers' intent is quite plain, even to our contemporary understanding, and their larger purposes quite apparent from a closer look at state history and the text of the relevant constitutional clauses.

¶ 104 The authors of the Arizona Constitution did not adopt the religion clauses in a historical vacuum. Article II, § 12 and article IX, § 10 were the product of contemporary social forces and a national and local battle over separation of church and state in public school instruction. The people who formed this state attempted to save us from religious bigotry by separating religion from state funding and support through our explicit religion clauses.

1. The national scene

¶ 105 In the nineteenth century atmosphere, before the Establishment Clause applied to the states, the emerging

public schools commonly included explicit religious instruction. The religious make-up of the United States was predominantly Protestant, and public school instruction reflected this majority religion. The latter half of the nineteenth century, however, witnessed large Catholic immigration into the United States. Catholic church leaders resisted the open Protestantism that pervaded public school curriculum. As Catholic political power grew, so did efforts to secure state aid to parochial schools. At the same time, Protestants sought to "preserve the [Protestant] religious aspects of the public school curriculum and to protect the common culture from the growing Catholic menace. The Blaine Amendment was a product of that sentiment." Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 YALE L. & POL'Y REV. 113, 145-46 (1996).

¶ 106 These education-related contests between Protestants and Catholics led to calls for stringent separation of church and state in education finance. President Grant took up the cause in an 1875 address to the Army of Tennessee:

> Let us then begin by guarding against every enemy threatening this perpetuity of free republican institutions. . . . *The free school is the promoter of that intelligence which is to preserve us.* . . . Let us all . . . [*e*]*ncourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools.* Resolve that either the state or the nation, or both combined, shall support institutions of learning sufficient to afford to every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. *Leave the matter of religion to the family circle, the*

> *church, and the private school supported entirely by private contributions. Keep the church and state forever separate.*

CONRAD HENRY MOEHLMAN, THE AMERICAN CONSTITUTIONS AND RELIGION 16 (1938) (emphasis in original). In his next message to Congress, President Grant recommended a constitutional amendment to preclude state funding of private (Catholic) schools, while permitting continued Protestant influence in the public schools via reading of the King James Bible. The proposal, named after its sponsor, Rep. John Blaine, became known as the Blaine Amendment.

¶ 107 As passed by the House of Representatives, the amendment provided, *inter alia*, that "no money raised by taxation in any state, *for the support of the public schools or derived from any public fund therefor*, shall ever be under the control of any religious sect . . . ." One of the Senate's principal objections to the amendment was that it "would only forbid *school* funds [from aiding religion and denominational schools]; it would not prohibit the States from using any other public funds for religion or sectarian schools. To block *every avenue*, the Senators wrote several new strictures into the House project." William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L. REV. 183, 193 (1965) (second emphasis added; cites to Congressional Record omitted). As a result, the version of the Blaine Amendment that narrowly failed to receive Senate approval read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. *No public property, and no public reve-*

> *nue* of, nor any loan of credit by *or under the authority* of, the United States, *or any State, Territory,* District, or municipal corporation, *shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or antireligious sect, organization, or denomination,* or wherein the particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; *and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination or to promote its interests or tenets.* This article shall not be construed to prohibit the reading of the Bible in any school or institution.

MOEHLMAN, *supra*, at 17 (emphasis added).

¶ 108 While the Blaine Amendment, and similar proposals,[11] failed in Congress, it ultimately met with considerable success in the states. Between 1877 and 1917, its language was adopted in whole or in part in twenty-nine states constitutions. Ann Marlow Grabiel, Comment, *Minnesota Public Money and Religious Schools: Clearing the Federal and State Constitutional Hurdles*, 17 HAMLINE L. REV. 203, 223 (1993). Ironically, however, the anti-Catholic bigotry that inspired the Blaine Amendment was displaced in many of those states by a principled commitment to strict separation between church and state in edu-

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11 Several congressmen continued to propose similar constitutional amendments through 1888. *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution: A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 433 n.115 (1985). From 1889 on, the Blaine agenda was advanced in Congress by inserting requirements in the enabling acts for prospective states that church/state separation clauses be included in the constitutions of newly admitted states. *See id.* at 433.

cation. "It is one of the great ironies of American constitutional history that the Blaine Amendment, which erupted out of a spirit of religious bigotry and a politics that sought to promote Protestantism in public schools, eventually became an emblem of religious freedom in some states." Viteritti, *supra*, 15 YALE L. & POL'Y REV. at 147. Arizona was one of those states.

2. The Arizona scene

¶ 109 Arizona's Blaine Amendment clauses contain a stringent proscription on educational aid, forbidding state aid to all private schools, sectarian or secular. *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 216 (1993) (our article IX, § 10 "is a more targeted (and potentially more stringent) specification of the prohibition against subsidies to private entities"); Linda S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 633 (1985). The history of Arizona public schools and the pertinent legislation leading up to the constitutional convention confirm that the strict language of our constitution emerged from the framers' firm conviction that the state should be absolutely prohibited from subsidizing any form of sectarian education—a conclusion drawn from the framers' territorial experience.

¶ 110 In 1864, the territory's First Legislative Assembly established a publicly funded common school system. *See* chapter XXIII, § 11, The Howell Code (1864). Ironically, the first school appropriation was an 1866 grant of $250 to the mission school at San Xavier. JAY J. WAGONER, ARIZONA TERRITORY, 1863-1912: A POLITICAL HISTORY 51 (Tucson 1970). In the following decade, however, the national battle over public funding for sectarian schools hit Arizona's emerging public education

system, and Arizona forged a clear path toward separation by prohibiting state aid to sectarian education.

¶ 111 In light of the large Mexican-American, predominantly Catholic population of the territory, the possibility of public funding for Catholic schools would have had a substantial impact. *See* Samuel Pressly McCrea, *Establishment of the Arizona School System, in* BIENNIAL REPORT OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE TERRITORY OF ARIZONA, FOR THE YEARS ENDING JUNE 30, 1907 AND JUNE 30, 1908, at 95 (1908). Governor A.P.K. Safford, known as the father of Arizona education, expressed early concern that sectarian, primarily Catholic, schools would attract public moneys for their support. McCrea, *supra, in* BIENNIAL REPORT, at 96. The Legislative Assembly apparently shared Governor Safford's concern and in 1871 sought to prevent such a result by enacting a prohibition against use of sectarian books or other documents and teachings of "sectarian or denominational doctrine" in Arizona's public schools. Any school in which such sectarian or denominational doctrine had been taught could not receive public school funds. Act to Establish Public Schools in the Territory of Arizona § 34 (approved Feb. 18, 1871).

¶ 112 In a report to the Federal Commissioner on Education, Governor Safford explained and endorsed the logic of such a provision:

> To the end that children of every religious faith may consistently attend these schools, the legislature wisely prohibited the use of sectarian books and religious teaching in them. Therein children of parents of any and every faith can meet in harmony and upon an equality in all respects. Based upon any other character of law, the free-school-system would and should soon be destroyed. Were one religious

doctrine taught, children of other religious doctrines would surely be driven from the schools. In this age of science, learning, and religious and political independence, it will not do to promote any sect at the common expense. The funds which maintain the grand free schools are drawn from people of every creed, and it is but just that all shall be equally benefited, without the least attempt to inculcate any of the many religious beliefs. Religious instruction peculiarly belongs to the family-circle and church. The most cruel and bloody wars recorded in the pages of history show that they were the offspring of the intolerance of religious sects. Bigotry has brought untold thousands of innocent men and women to torture and death. The cloak of religion has been used to cover dire crimes against mankind; but happily for poor and rich of all beliefs and conditions, the time for such cruel intolerance has passed away. Under the benign influences of our free Republic, every one has and can exercise the inalienable right, free from threats and oppression, to worship God in his own way; and our public schools constitute the safe foundation upon which the prosperity and endurance of our beloved country rest and our rightful liberties are secured and assured. In the public-school-room the children of every creed are gathered, not to despise and hate each other, as in olden times, under sectarian teaching, but to love and respect manly and womanly virtues wherever or in whomsoever found, regardless of the faith one or the other entertains.

Report of Hon. A.P.K. Safford, in REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1873, at 426-27 (G.P.O. 1874).

¶ 113 The 1871 act was also the first to provide for a general or territorial tax to support schools. WAGONER, *supra*, at 106. Section 32 stated: "No portion of the public school funds, whether derived from Territorial, county or district taxation, shall be used or appropriated to any other than school purposes." Yet in a separate act, the 1871 Legislative Assembly appropriated $300 from the general fund to the Sisters of St. Joseph of Tucson to reimburse them for school books purchased.[12] This appropriation, which was renewed by the 1873 Legislative Assembly, was apparently not paid because the territorial treasurer believed payment would be illegal. But in 1875, the Legislative Assembly ordered it paid from the Territory's general fund. McCrea, *supra*, in BIENNIAL REPORT, at 88.

¶ 114 This 1875 payment, coupled with the Catholic community's apparent boycott of fundraising efforts on behalf of the public schools, set off a wave of debate on the issue of state funding of private religious institutions. *See* John C. Bury, Dissertation, *The Historical Role of Arizona's Superintendent of Public Instruction* 114-29 (Northern Arizona University 1974). The cause for public support of Catholic schools was championed by Chief Justice Edmund Dunne of the Arizona Territorial Supreme Court. He argued before the 1875 Legislative Assembly that either Catholics whose children attended private, sectarian schools should be exempt from paying taxes to support public schools or public moneys should be used to support Catholic schools. *Id.* at 117-18. He sought to enforce his vision of state-funded Catholic schools by asking the Assembly to create corporations that would establish private schools. These corporations would then re-

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[12] In 1871, St. Joseph's Academy, a private girls' school, was the only school operating in Tucson. The first public school did not open until 1872. WAGONER, *supra*, at 70, 107.

ceive tax funds based on the number of enrolled students in their schools. *Id.* The measure was ultimately defeated,[13] and Chief Justice Dunne was relieved of his position by the federal government. *Id.* at 119-20, 124.

¶ 115 Governor Safford remained publicly silent on the issue until after the Legislative Assembly settled it in favor of nonsectarian instruction. In his 1877 message to the Legislative Assembly, Governor Safford recounted the achievements of the nascent Arizona public schools and strongly argued for continuing nonsectarian instruction and limiting expenditure of public school funds to support of public schools:

> The school room is peculiarly an American institution. It is organized and kept free from sectarian or political influences . . . . *To surrender this [public school] system, and yield to a division of the school fund upon sectarian grounds, could only result in the destruction of the general plan for the education of the masses, and would lead, as it always has wherever tried, to the education of the few and the ignorance of the many.* This proposition is so self-evident, and experience has proved it so true, that it does not require argument.

Journal of the Ninth Legislative Assembly, at 32 (1877) (emphasis added).

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13 According to McCrea, when Arizona decided against pubic support of private sectarian education it "then and there parted from New Mexico in educational policy." McCrea, *supra*, in BIENNIAL REPORT, at 96. The contrast with New Mexico is as striking as it is illuminating. In New Mexico, the Catholic Church dominated education, and attempts to secularize the schools via the 1889 draft constitution were in large part responsible for the failure to ratify that constitution. *See* ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912, at 125, 159-68 (1968).

¶ 116 Resolution of the 1875 school controversy was not, however, the final legislative word on sectarian influence in the public schools. In 1885, the Legislative Assembly revised the school laws to provide far more stringent protections. The first change was to amend the earlier proscription on sectarian instruction to read:

> No books, tracts or papers of a sectarian character shall be used in, or introduced into any school established under the provisions of this act, nor shall any sectarian doctrine be taught therein, *nor shall any school whatever under the control of any religious denomination, or which has not been taught in accordance with the provisions of this act, receive any of the public school funds, and upon satisfactory evidence of such violation the county school superintendent must withhold all apportionments of school moneys from said school.*

Act to Establish a Public School System and to provide for the maintenance and supervision of Public Schools in the Territory of Arizona § 84 (approved March 12, 1885) (emphasis added).

¶ 117 While this first amendment did little more than strengthen the existing proscription on sectarian influence in the public schools, a second legislative measure distinguished Arizona from the anti-Catholic bigotry pervading most of the nation on the church/school question. In contrast to the Blaine Amendment and constitutional amendments in states that discriminated against Catholics and promoted Protestantism through reading the King James Bible in schools, Arizona legislated against *all religious exercise:*

> Any teacher who shall *use any sectarian or denominational books or teach any sectarian doctrine, or conduct any religious exercises* in his school, or who

> shall fail to comply with any of the provisions menitoned in section 89 of this act, shall be deemed guilty of unprofessional conduct, and it shall be the duty of the proper authority to revoke his or her certificate, or diploma.

Id. § 93 (emphasis added). As noted in a United States Bureau of Education Report on Public School Education in Arizona:

> Every school law since that of 1871 had contained provisions against the introduction of tracts or papers of a sectarian character into the public school, also against the teaching of any sectarian doctrine in them. For some reason this was not believed to be drastic enough, and a section was added to the law which provided for revoking teachers' certificates for using in their schools sectarian or denominational books, for teaching in them any sectarian doctrine, or for conducting any religious exercise therein. The lawmakers evidently aimed to relegate all religious teaching to the home and the church. *The prohibiting of "religious exercises" in schools has met with strong condemnation from many Protestant church members, but with the variety of religious creeds represented in the Territory it is doubtful whether a better policy could have been found.*

STEPHEN B. WEEKS, UNITED STATES BUREAU OF EDUCATION, HISTORY OF PUBLIC SCHOOL EDUCATION IN ARIZONA 55 (Bulletin No. 17, 1918) (quoting McCrea, *supra*, *in* BIENNIAL REPORT, at 121-22) (emphasis added). Thus, by 1885 Arizona had firmly demonstrated its commitment to the separation of church and state in education. Moreover, it had radically distinguished itself from most of the rest of the nation by extending its separationist commitment to preclude Protestant, Catholic, and all other religious influence in its public schools.

¶ 118 Arizona's continued commitment to church/state separation in education was next evinced in the 1891 Draft Constitution proposed as part of the statehood movement. Article VIII, § 3 stated:

> *All common schools, universities and other educational institutions,* for the support of which lands have been granted to the State, or *which are suported by a public tax, shall remain under the absolute and exclusive control of the State, and no money raised for the support of the public schools of the State shall be appropriated or used for the support of any educational institution, wholly, or in part, under sectarian or ecclesiastical control.* No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as teacher or student. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any books, papers, tracts, or documents of a political, sectarian or denominational character be used or introduced in any school established under the provisions of this Article.

Notably, the latter portion is copied practically verbatim from Arizona's longstanding legislation on the subject.

3. The 1910 constitutional convention

¶ 119 Unless we assume our convention delegates lived in isolation from the issues of the day and were ignorant of their recent past, the foregoing leaves little doubt about the separationist intent of the framers of article II, § 12 and article IX, § 10. We need not, however, infer the intent of those proscriptions solely from the history leading up to the convention. The events surrounding their enactment speak directly to the question.

¶ 120 The substance of the Arizona Constitution, like that of numerous other state constitutions, was not entirely under the framers' control. Arizona's admission into the Union was authorized by a federal enabling act. *See* 36 U.S. Stat. 568-79 (1910). Strict separation of church and state continued to be important to Congress at the time it passed the Arizona Enabling Act, and statehood was expressly conditioned on the "perfect toleration of religious sentiment." Arizona Enabling Act § 20, ¶ First. In addition, Congress required that "provisions shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of said State and free from sectarian control." *Id.* ¶ Fourth. Further, "no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college, or university." *Id.* § 26. Such conditions were common to several western states seeking admission to the union. *See* ROBERT LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912 (1968); Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451, 458-69 (1988) (description of background and emotion surrounding Blaine Amendment and influence on wording of constitutions in emerging western states).

¶ 121 Numerous, and often repetitive, propositions bearing on religion and education were introduced, considered and either incorporated or rejected at our 1910 convention. As initially drafted, Proposition 15, which was the first dealing with education, contained a detailed proscription of state funding of sectarian schools and then substantially tracked the language of the 1891 Draft Constitution and prior legislation. It provided:

> Neither the Legislature or any county, city, town, township, school district or other public corporation shall ever make any appropriation or pay from any public fund or moneys whatever in aid of any church or sectarian or religious society, or any sectarian or religious purpose, or to help support or sustain any schools, academy, seminary, colleges, universities, or other literary or scientific institutions controlled by any church or sectarian or religious denomination whatsoever, nor shall any grants or donations of any lands, moneys or other personal property ever be made by the State or any other such public corporation to any church, or any sectarian or religious purpose.
>
> No . . . teacher or student of any [public educational] institutions shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrine or doctrines shall ever be taught in public schools. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of the Legislature of the State of Arizona, nor shall any teacher of any district receive any of the public school money in which the schools have not been taught in accordance with the provisions of this section.

THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 (John S. Goff, ed.) (hereinafter RECORDS), Proposition 15, §§ 4 and 6, at 1065-66.

¶ 122 One day after the introduction of Proposition 15, delegate Crutchfield, a Methodist minister, introduced Proposition 41. Notably, Crutchfield's proposal differed from Proposition 15 in that it explicitly permitted nonsectarian religious instruction by omitting Proposition 15's

proscription that "no teacher or student of any [public educational] institutions shall ever be required to attend or participate in any religious service whatever" and closing with a clause borrowed directly from the Blaine Amendment: "Provided, [t]hat nothing herein contained shall be interpreted as forbidding the reading of the Bible in the public schools." *Id.* at 1139.

¶ 123 Both Propositions 15 and 41 were referred to the Committee on Education. On November 14, the Committee recommended rejection of Proposition 41 and approval of a Substitute Proposition 15 that more concisely stated the proscription on use of public funds for sectarian purposes: "[N]o public funds of any kind or character whatever, state, county or municipal, shall be used for sectarian purposes." *See id.* at 555, 1360, 1364-65. The convention eventually rejected Proposition 41 by postponing it indefinitely. *Id.* at 540. The majority is not correct, therefore, in stating that the convention transcripts "reveal almost nothing about the clauses in question." Slip op. at ¶ 58.

¶ 124 Thus far in the convention, no explicit discussion of state support of religion had taken place. On November 19, the only speech given on the issue was made by delegate William J. Morgan, a former territorial legislator from Navajo County. The *Arizona Gazette* reported his speech on tax exemption of church property as follows:

> He began his address by quoting from former President Grant, who said that if the evils resulting from the extensive acquisition of property by the churches were not corrected they would soon lead to trouble. General Grant in that famous argument said that with the growth of ecclesiastical property the time would probably come when sequestration would come about

> and that it would in all probability be attended by the shedding of blood.
>
> * * *
>
> Morgan argued for free speech, free thought and a free press[,] for the separation of church and state, for keeping the Bible out of the public schools, and for the taxation of all property. He quoted decisions of the supreme courts of Illinois and Wisconsin that the Bible is legally sectarian.

Arizona Gazette, Nov. 19, 1910, at 1.

¶ 125 While it is impossible to discern the precise effect of Morgan's strong words on the delegates, his speech nonetheless demonstrates that some of the delegates adhered to extreme views on separating church from state. More important, Morgan's statements referring to President Grant's calls for strict separation of church and state show the delegates' familiarity with the Blaine Amendment. *See id.* This, coupled with Morgan's calls to proscribe Bible reading in public schools, mirrors the strict separationist positions previously taken by the Legislative Assembly as evidenced, for example, by the 1885 school law proscribing all religious exercises.

¶ 126 Although Morgan's proposals to prohibit tax exemptions were ultimately rejected, his views on Bible reading were adopted. Crutchfield's Proposition 41 was killed only three days after Morgan's speech, and the amended Proposition 15 was adopted by the delegates. RECORDS, at 555.

B. Text and intent

¶ 127 From this record, it is clear the delegates sought to preserve strict separation of church and state in the public schools by excluding all religious exercise, con-

sistent with Arizona's territorial history. In fact, Arizona's constitution far exceeds the Enabling Act's requirements. *Cf.* Utter & Larson, *supra,* 15 HASTINGS CONST. L.Q. at 467-69 (discussing how the Washington clauses were adopted to effectuate Blaine agenda). In my view, the import of the framers' choice not to adopt Proposition 41's Bible-reading provisions is clear: Given the delegates' stance on religious exercise in the public schools and the breadth of Arizona's strong policy of refusing to fund private or sectarian education, the delegates clearly intended to prohibit state sponsorship or support of sectarian schools. They expressed this intent three times and in clear English. In article II, § 12: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." And in article IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." And in article XI, § 7: "No sectarian instruction shall be imparted in any school or State educational institution that may be established under this Constitution . . . ."

¶ 128 Additional evidence of Arizona's separationist commitment is adduced from an examination of the Blaine clauses of the 1889 Washington Constitution,[14] after which much of the Arizona Constitution, especially

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[14] Utter & Larson, *supra,* 15 HASTINGS CONST. L.Q. at 468-69. The majority argues that we should give little heed to Washington's constitutional provisions, even though they are identical to ours, and less to Washington's decisions on this subject, even though we have many times indicated that decisons from Washington's courts with respect to our constitutional provisions will be given great weight. Slip op. at ¶¶ 68, 70. But Washington's clauses, like Arizona's, came from the national debate described above and reflect a common view of the prohibition on using public funds to promote any sectarian instruction. *Id.*

article II, was modeled. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 n.12, 773 P.2d 455, 461 n.12 (1989).[15] Article I, § 11 of the Washington Constitution is in pertinent part identical to Arizona's article II, § 12. It is therefore safe to assume that our provision was borrowed. Thus, Washington cases interpreting their constitution are persuasive authority with respect to our constitution. *See Schultz v. City of Phoenix*, 18 Ariz. 35, 42, 156 P. 75, 77 (1916) (When clauses in the Washington Constitution are "very much like the same provisions" in our constitution, "we think the law announced by [the Washington Supreme Court] is very persuasive."). The court does not tell us why we should abandon that rule, except to say that Washington and Arizona are different. Slip op. at ¶ 68, 70. No doubt this is true, but our constitutional text was extensively borrowed from Washington and our jurisprudence has always looked to Washington.

¶ 129 The Washington cases demonstrate that state's absolute proscription on any state support, direct or indirect, to secular education. *See Witters v. Washington Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989) (financial vocational assistance to student who was pursuing a Bible studies degree violated state constitution); *Wash-*

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[15] *See Roosevelt Elem. Sch. Dist. v. Bishop*, 179 Ariz. 233, 247 & n.4, 877 P.2d 806, 820 & n.4 (1994) (Feldman, J., concurring) ("our delegates routinely borrowed provisions from the Washington Constitution,") (citing *Mohave County v. Stephens*, 17 Ariz. 165, 170-71, 149 P. 670, 672 (1915) ("section 4, art. 6 of our Constitution is taken almost word for word from the Washington Constitution"); *Faires v. Frohmiller*, 49 Ariz. 366, 371, 67 P.2d 470, 472 (1937) (as "far as its judicial features were concerned," the Arizona Constitution was evidently modeled on similar provisions" in the Washington Constitution); *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 166, 370 P.2d 652, 654 (1962) (Arizona constitutional clause against uncompensated taking of private property "was adopted from the constitution of Washington")).

ington State Higher Educ. Assistance Auth. v. Graham, 529 P.2d 1051 (Wash. 1974) (state purchase of loans made to students at sectarian schools, while indirect and incidental, was unconstitutional attempt to circumvent provisions of state constitution forbidding any use of public funds to support sectarian schools); *Weiss v. Bruno,* 509 P.2d 973 (Wash. 1973) (public funds for financial assistance to secondary and elementary students at nonpublic schools violates state constitution). As with Arizona's tax credit, none of these programs dealt with direct appropriation to schools.

¶ 130 Given the history of the Blaine Amendment, the stringent language of our constitution, the framers' indisputable desire to exceed the federal requirements, the Washington model, and the specificity of our constitution's proscription of state aid to private and secular schools. I think its is absolutely clear the constitution prohibits the tax credit at issue in this case. Leaving aside its facade and ingenious methodology, the Arizona tax credit grants a state subsidy to private and sectarian schools and thus violates both the text and the intent of our constitution.

¶ 131 The majority concedes the potential that the government subsidization of private schools may weaken the public school system. The wisdom of such policy making, it says, is a matter left to the Legislature. Slip op. at ¶ 63. But the history and text of Arizona's religion clauses make it clear that the delegates to the 1910 convention were well aware of the recent sectarian battles and the resulting Blaine Amendment and did not intend to give the Legislature the power to subsidize a private, sectarian school system.

¶ 132 Of course, if legislators wish to revive what is foreclosed by our constitutional history and text, they may propose a constitutional amendment. Should Arizona's

citizens want to repeal our constitutional prohibitions, they may adopt such an amendment. But this court ought not destroy our framers' intent, which is exactly what it does by finding some distinction between direct appropriation and government-sponsored diversion of tax funds. Constitutional principle prevents the state from doing by indirection what the constitution forbids it to do directly.

C. Public money—deductions and credits

¶ 133 The majority next suggests an overly narrow interpretation of the term "public money" and concludes there is no constitutionally significant difference between a general tax deduction for a contribution to a private school and the Arizona tax credit. Slip op. at ¶ 38. I believe the majority is wrong on both counts.

1. Whether tax credits are public money

¶ 134 The majority argues that because the state lacks possession and immediate control of the tax credit funds, they are not public money. Slip op. at ¶¶ 36-38. The same can be said, of course, about funds in an escrow account that are payable to the state on closing, debts owed the state but not yet due and payable, taxes due (after all credits) but not yet paid, and innumerable other funds that are owed but have not yet reached the treasury. It is a dangerous doctrine that permits the state to divert money otherwise due the state treasury and apply it to uses forbidden by the state's constitution. But that, of course, is the exact result of today's decision.

¶ 135 The majority observes that neither the constitution nor the statutes explicitly define public money. Slip op. at ¶ 33. It then strains to extrapolate a definition of public money to be applied to the religion clauses from taxpayer standing cases such as *Grant v. Board of Regents*, 133 Ariz. 527, 652 P.2d 1374 (1982), and state tax forms.

Slip op. at ¶¶ 34-36. The issue in Grant, however, was whether "a taxpayer can maintain an action to enjoin the wrongful expenditure of state funds where the funds in question are not raised by taxation or where the plaintiffs have not in some way contributed to them." 133 Ariz. at 529-30, 652 P.2d at 1376-77.

¶ 136 *Grant* and the other authorities the majority cites involve bureaucratic management and mismanagement of public finances, problems that can arise only when funds are in actual possession or control of state agencies. The definitions in those cases are irrelevant to cases involving state subsidies. If the court need infer a definition of public money, we would be better to find it in the statutory provisions dealing with the precise matters at issue in this case.

¶ 137 The tax code does define public money when read in conjunction with legislative and executive branch implementation of our constitution. Article IX, § 4 provides that an "accurate statement of the receipts and expenditures of the *public money* shall be published annually, in such manner as shall be provided by law." (Emphasis added.) The Legislature has implemented this constitutional requirement:

> A. The director [of the Department of Revenue] shall be directly responsible to the governor for the direction, control and operation of the department and shall:
>
> * * *
>
> 4. In addition to the report required by paragraph 2 of this subsection, on or before November 15 of each year issue a written report to the governor and legislature detailing the approximate costs in lost revenue for all state tax expenditures in effect at the time of the report. For the purpose of this para-

> graph, "*tax expenditure*" means any tax provision in state law which exempts, in whole or in part, any persons, income, goods, services or property from the impact of established taxes including deductions, subtractions, exclusions, exemptions, allowances and *credits.*

A.R.S. § 42-105 (emphasis added). Thus, the Legislature clearly views the article IX, § 4 words "receipts and expenditures of public money" to embrace "tax expenditures," including tax credits.

¶ 138 The executive branch also views tax credits and deductions as "tax expenditures" similar to direct appropriations. Thus, in the annual report to the Legislature required by § 42-105, the Department of Revenue explains:

> *Tax expenditures are* provisions within the law (exemptions, exclusions, *deductions and credits*) that are designed to encourage certain kinds of activity or aid to taxpayers in certain categories. Such provisions, when enacted into law, result in a loss of tax revenues, thereby reducing the amount of revenues available for state (as well as local) programs. *In effect, the fiscal impact of implementing a tax expenditure would be similar to a direct expenditure of state funds.*

ARIZONA DEPARTMENT OF REVENUE, THE REVENUE IMPACT OF ARIZONA'S TAX EXPENDITURES 1 (May 1998) (emphasis added).

¶ 139 Legislative and executive branch determination that tax expenditures such as tax credits comprise public money, plainly comports with long established, fundamental principles of public finance.[16] *See, e.g.*, Stanley

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[16] Note, however, that there is a difference between deductions and credits. A progressive income tax "must tax only net income if its taxable base is to have some relationship to a taxpayer's

S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705, 706 (1970) ("The term 'tax expenditure' has been used to describe those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives."). The majority debates our characterization of a tax credit as an expenditure of public money. Slip. op. at ¶¶ 37-38, 40. But it is clear that the leading scholars in the field reject the majority's views. So also do Arizona's legislative and executive branches, charged with the power and responsibility to collect and spend public funds.

¶ 140 Courts throughout the country also are well aware that tax credits are expenditures of public money. The majority overlooks the great body of precedent dealing with the religion clauses. Other courts, state and federal, have long viewed "tax subsidies or tax expenditures [similar to Arizona's tax credit as] the practical equivalent of direct government grants." *Opinion of the Justices to the Senate,* 514 N.E.2d 353, 355 (1987); *see also Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 236, 107 S. Ct. 1722, 1731 (1987) (Scalia, J. dissenting) ("Our opinions have long recognized—in First Amendment contexts as elsewhere—the reality that tax exemptions, credits, and deductions are 'a form of subsidy that is administered through the tax system,' ") (quoting *Regan*

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ability to pay, a goal we [seek]. The income tax system requires a particular class of deductions or exclusions to prevent its taxing gross receipts (a base that is unrelated to the taxpayer's ability to pay). For example, exclusions for capital recoveries and deductions for costs of production are needed to secure an accurate measure of net income. Such deductions and exclusions, properly timed, help refine the net income concept and are called 'normative' provisions, not tax expenditures." Bernard Wolfman, *Tax Expenditures: From Idea to Ideology,* 99 HARV. L. REV. 491, 491-92 (1985).

v. Taxation With Representation, 461 U.S. 540, 544, 103 S.Ct. 1997, 2000 (1983)); *Nyquist,* 413 U.S. at 791, 93 S.Ct. at 2974 (money available through tax credit is charge made against state treasury; tax credit is "designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a certain act the state desires to encourage"); *Public Funds for Public Schools v. Byrne,* 444 F.Supp. 1228 (D. N.J. 1978), *aff'd,* 590 F.2d 514 (3d Cir. 1979); *Minnesota Civil Liberties Union v. Minnesota,* 224 N.W.2d 344 (Minn. 1974), *cert. denied,* 421 U.S. 988, 95 S.Ct. 1990 (1975); *Curchin v. Missouri Indus. Dev. Board,* 722 S.W.2d 930, 933 (Mo. 1987) ("tax credit is as much a grant of public money or property and is as much a drain on the state's coffers as would be an outright payment by the state. . . .").

¶ 141 Moreover, our own legislature leaves little question that it views the specific tax credit at issue in this case as a matter involving public funds. It requires that the "director of the department of revenue shall submit a report to the governor, the president of the senate and the speaker of the house of representatives regarding the *fiscal impact* of the tax credit provided for donations to school tuition organizations on July 1, 1999." Laws 1997, Ch. 48, § 4 (emphasis added).

¶ 142 Finally, the judicial wisdom of treating such tax expenditures as public money comports with one of the nation's most reputable experts on the subject:

> The U.S. Constitution and some statutory legislation impose restraints on the spending of government funds. Thus, under constitutional doctrines, the government may in general not engage in activities that are discriminatory in terms of race or sex, for example, or act without due regard for fair procedures and process. Direct government spending

> programs that involve such practices can be challenged in the courts. Private entities that receive significant support from government funds and engage in such practices are likewise subject to challenge. The question . . . is whether these constitutional doctrines also apply to tax expenditure benefits and to private entities receiving them. Given that tax expenditures are government assistance programs, it would seem almost axiomatic that they should.

STANLEY S. SURREY AND PAUL R. MCDANIEL, TAX EXPENDITURES 118 (1985). The authors expressly consider whether "the grant of an income tax credit" to "parents of children who send their children to parochial schools" should be included among the numerous constitutional issues involving tax expenditures. Unsurprisingly, they conclude:

> Judicial cases involving constitutional or interpretative issues with regard to tax expenditures should be decided in the same manner as cases involving direct government spending programs. Given the federal government's own assertion that tax expenditures "can be viewed as alternatives to budget outlays, credit assistance or other policy instruments," and the "[tax] expenditures have objectives similar to those programs funded through direct appropriations," it is difficult to see how this position can be denied.

Id. at 154 (quoting U.S. Government, Special Analysis G, 203, 1981).

¶ 143 The majority argues that there is a real debate about whether tax credits constitute public funds. Slip op. at ¶ 41. This argument resurrects a discredited critique of the tax expenditure concept. The United States Supreme Court spoke on that dead school of thought re-

cently, observing that the 'wholesale rejection of tax expenditure analysis was short-lived and attracted few supporters. Rather, *the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies.*" *Rosenberger v. Rectors & Visitors*, 515 U.S. 819, 861 n.5, 115 S.Ct. 2510, 2532 n.5 (1995) (Thomas, J., concurring) (quoting Donna D. Adler, *The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 862 n.30 (1993)) (emphasis added).

¶ 144 The majority in *Rosenberger* also makes it quite clear that the expenditure of funds that have not and will never enter the public treasury is nevertheless the use of public money subject to scrutiny under the federal Establishment Clause, a provision much less specific than our constitutional provisions. *Id.* at 842-43, 115 S.Ct. at 2523-24.

¶ 145 In sum, the majority's narrow interpretation of public money in a religion clause case is without precedential support and is contrary to academic and expert views as well as federal and state cases. Absent the taxing power, the money would not exist. In my estimation, the majority's attempt to support the credit with a comparison to valid tax deductions only makes the matter worse.

2. Deductions versus credits

¶ 146 The majority argues that Arizona's tax credit must be valid because there is no significant difference between it and long-recognized, valid tax deductions and credits. It fears that invalidating the private school tax credit "directly contradicts [Arizona's] decades-long acceptance" of charitable deductions and tax exemptions for churches and other religious institutions. Slip op. at ¶ 38, 43. I disagree.

¶ 147 There are very significant differences between valid tax benefits and the Arizona tax credit. The latter is not an inducement to charitable giving; there is no philanthropy at all because the credit provided is dollar-for-dollar. A taxpayer's $500 donation is rebated as a credit against the tax that otherwise would be paid to the state. It is a bottom-line reduction—money that *would,* in its entirety, go to the treasury.

¶ 148 Most of us do not enjoy paying taxes, and one would suspect that a large number of Arizonans faced with the choice of directing $500 to an STO supporting their favorite religious institution or to the tax collector would prefer the former, especially if there is a chance to make a profit.[17] Unlike a neutral deduction available for all charitable giving, the credit is not governmental encouragement of philanthropy. Instead, it is a direct government subsidy limited to supporting the very causes the state's constitution forbids the government to support.[18]

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[17] Arizonans may well make a profit on the tax credit. After a taxpayer has contributed to the STO and received a dollar-for-dollar refund from the Arizona Department of Revenue, nothing in the Internal Revenue Code prevents him or her from reporting the contribution as a charitable deduction on the federal income tax return. The taxpayer cannot do so on the state return because § 43-1089(C) states that the credit is "in lieu of any deduction pursuant to section 170 of the Internal Revenue Code and taken for state tax purpose." However, the Internal Revenue Code has no similar provision.

[18] It is interesting to note the degree of governmental encouragement provided by deductions compared to that provided by credits. Under § 43-1089, a couple with an income of $60,000 per year sending $500 to an STO would receive a tax credit of $500 and would thus save $500 in taxes. The "contribution" would cost them nothing. The same couple contributing to almost any other qualified philanthropic cause would receive a deduction from gross income. To reduce their state taxes by $500, that couple would need to contribute approximately $13,000. *See* Tax Tables, Arizona Department of Revenue, 1998.

Unlike neutral deductions, the credit is not the state's passive approval of taxpayers' general support of charitable institutions. Thus, there is no philanthropy here, no neutrality, and no limitation to secular use.

¶ 149 The majority argues that the Arizona tax credit is just one among many available credits. Slip op. at ¶ 15. This is true, but unlike valid tax credits, the private school tax credit supports an activity the constitution forbids the state to support. Other Arizona tax credits, such as those provided by §§ 43-1083 and 43-1084 (for installation of solar energy devices and purchase of agricultural water conservation systems), grant tax subsidies for programs the Legislature could support by direct appropriation if it so desired. As with the private school tax credit, the Legislature seeks by partial subsidization to encourage private action by Arizona's citizens. But the state constitution forbids subsidization of religious education, whether full or partial. As article II, § 12 says, "No public money . . . shall be appropriated for or applied to any religious worship, exercise, or instruction . . . ." (Emphasis added.) That prohibition is reinforced by article IX, § 10, which says, "*No* tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school." (Emphasis added.)

¶ 150 At present, the subsidy is capped at $500, but there is no principled reason under the majority's analysis that the limit could not be increased to whatever sum the Legislature chooses until the state is, in effect, paying the full cost of private, sectarian education. Pragmatically, today's opinion simply writes article II, § 12 out of the state constitution.

¶ 151 There is no need for this. The framers' intent to forbid governmental aid to private or sectarian schools does not require proscription of all deductions or exemp-

tions. We are squarely confronted with two fundamental axioms of constitutional interpretation. On the one hand "we are bound to uphold the Arizona Constitution, and the spirit and purpose of that instrument may not be defeated." *Selective Life Ins. Co. v. Equitable Life Assur. Soc.*, 101 Ariz. 594, 598, 422 P.2d 710, 714 (1967). On the other hand, as the majority recognizes, "in order to fulfill the original intent of the constitution, [its provisions] must be viewed in the light of the contemporary society, and not strictly held to the meaning and context of the past." *Community Council v. Jordan*, 102 Ariz. 448, 454, 432 P.2d 460, 466 (1967).[19] In balancing these considerations, we

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[19] The majority finds specific support in *Community Council*. Slip op. at ¶¶ 45, 57-58. *Community Council* is not on point. It holds that the state may reimburse a community council for its "direct financial aid [to the indigent] in emergency situations" without violating the Arizona Constitution, even though the Salvation Army, a religious organization, was the central agency through which the aid was disbursed and the Phoenix Council of Churches participated in choosing the disbursement agency. 102 Ariz. at 450-51, 432 P.2d at 462-63. But in *Community Council* the ultimate recipients of aid were the impoverished persons, not religious organizations, as is the situation in the case before us. In *Community Council* neither the Council's initial contributions nor the state's reimbursements were used to further sectarian observance or instruction but, rather, to provide a form of welfare assistance. This, of course, is something for which the Legislature could have made a direct appropriation. I have no quarrel with *Community Council*. It would be a strange rule indeed that would prevent the state from utilizing the beneficial services of religious organizations to help the needy or to accomplish any other goal perceived as worthwhile and not prohibited by the constitution. The constitution does not require government to sever contact with religious institutions or to dispense with their help. It does prohibit providing them with the money with which to instruct in and inculcate their religious beliefs. In the present case, unlike *Community Council*, the money does not pass through the religious institution to help the needy. Instead, it stays in the religious organizations, where it may be used for religious instruction and observance for all, rich and poor.

need not subscribe to an absolutist position that offends historical practices recognized since statehood or to a position that ignores the obvious and imperative text and intent of the state constitution. There is a middle road that accounts for both considerations.

¶ 152 The framers had no specific intent to invalidate generalized charitable tax deductions for grants to private and sectarian schools. As shown by their treatment of Morgan's exemption proposition, they intended to continue the practice of property tax exemptions for charitable institutions, including churches and religious schools. *See* article IX, § 2. At the time our constitution was written there was no income tax, state or federal, and no deductions to worry about. Since the 1913 adoption of the Sixteenth Amendment to the federal constitution and subsequent imposition of federal and state income taxes, a historical acceptance has grown around deductions for generalized charitable giving, much like that recognized for exemptions under the state and federal constitutions. *Walz v. Tax Comm'n,* 397 U.S. 664, 669-70, 90 S. Ct. 1409, 1411 (1970).[20] There is no need to fear that invalidation

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[20] *Walz* speaks to the historical acceptance of exemptions for religious institutions:

> All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. . . . Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally *so long as none was favored* over others and none suffered interference.

Id. at 676-77, 90 S.Ct. at 1415 (emphasis added) (footnote omitted).

> [A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state

of the Arizona tax credit will upset the apple cart and invalidate tax exemptions and deductions for charitable giving to churches, private and religious schools, and similar institutions. The historical practice of allowing such benefits as part of the state's encouragement of general philanthropy, combined with a neutral program providing such benefits for contributions to all charitable, nonprofit endeavors, does not offend the constitution. The Arizona tax credit, however, is available only for grants to predominantly religious institutions. General deductions and exemptions are but two of many philanthropic private choices taxpayers may make as an accepted element of contemporary democracy.[21] The tax credit is simply a badly dis-

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> inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .' Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S.Ct. 9, 10, 67 L.Ed. 107 (1922).

Id. at 678, 90 S.Ct. at 1416.

[21] Again, the analogy to exemptions is useful. *Walz* establishes the constitutionality of exemptions due to their neutrality toward religon, using words quite applicable to deductions, credits, and other tax benefits:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship *within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.* The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in

guised end-run around the state constitution. It is as invalid as a statute limiting charitable deductions only to contributions to religious organizations.

¶ 153 Indeed, it is quite likely that prohibiting deductions for charitable contributions to religious institutions or schools when such deductions are generally permitted for contributions to all types of other charitable institutions would discriminate against religion and thus violate the Free Exercise Clause of the First Amendment. *Rosenberger*, 515 U.S. at 849-51, 115 S. Ct. at 2526-28 (O'Connor, J., concurring); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S. Ct. 2141 (1993); *Widmar*, 454 U.S. at 274, 102 S. Ct. at 277.

D. Article IX, § 10 and the laying of taxes

¶ 154 In two brief paragraphs, the majority asserts that article IX, § 10, which states that no tax should be "laid . . . in aid of any church, or private or sectarian school, . . ." is inapplicable because a "tax credit is not an appropriation of public money. . . . To the contrary, this measure *reduces* the tax liability of those choosing to donate to STOs." Slip op. ¶¶ 49, 50 (emphasis in original).

¶ 155 I cannot agree. The majority does not tell us how one can obtain a credit against a tax unless the tax is first laid. The school tax credit is an offset against taxes otherwise due and owing, as the statute itself describes it. *See* § 43-1089(B) (unused tax credits in any particular year may "offset" future taxes). The aid to private schools comes from a tax that was laid and imposed. Absent the state's levy of a tax, there would be nothing to offset and consequently no credit. Article IX, § 10 applies.

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community life and finds this classification useful, desirable, and in the public interest.

397 U.S. at 672-73, 90 S.Ct. at 1413.

CONCLUSION

¶ 156 We are all free to use *our* money to support any religious institution of *our* choice. Under the Free Exercise Clause, the government cannot prevent us from making that choice. It may passively encourage such philanthropy as part of a scheme of using tax benefits to support charitable giving of all types—to religious, nonreligious, educational, social service, and all the other institutions that qualify for deductions. So long as the tax benefits are general and neutral, they may be allowed even though some of the institutions supported are those the government is prohibited from assisting by direct grants or subsidies.

¶ 157 But the Arizona tax credit is quite different. It is directed so that it supports only the specific educational institutions the Arizona Constitution prohibits the state from supporting—predominantly religious schols. By reimbursing its taxpayers on a dollar-for-dollar basis the state excuses them from paying part of their taxes, but only if the taxpayers send their money to schools that are private and predominantly religious, where the money may be used to support religious instruction and observance. If the state and federal religion clauses permit this, what will they prohibit? Evidently the court's answer is that nothing short of direct legislative appropriation for religious institutions is prohibited. If that answer stands, this state and every other will be able to use the taxing power to direct unrestricted aid to support religious instruction and observance, thus destroying any pretense of separation of church and state.

¶ 158 I disagree for the reasons stated and respectfully dissent.

STANLEY G. FELDMAN
Justice

CONCURRING:

JAMES MOELLER
Justice (Retired)

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

Nos. 98-1716, 98-1718

In The

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,

Petitioners,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

LOUIS RHODES,

Petitioner,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Arizona

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COUNTERSTATEMENT OF ISSUE PRESENTED

Does the Arizona School Tuition Organization Tax Credit Program, which provides state income tax credits for voluntary contributions to charitable scholarship organizations, and adds private schools to an existing array of public school choices, violate the First Amendment's establishment clause?

PARTIES REPRESENTED

The parties represented herein were intervenors/respondents in the action below: Lisa Graham Keegan, in her official capacity as Superintendent of Public Instruction and as a parent and taxpayer; Emmett McCoy, Sr. and Alfreda McCoy, in their own behalves and as natural guardians of their children, Dallas McCoy, Krystal McCoy, Sean McCoy, Brandi McCoy, Daniel McCoy, and Priscilla McCoy; Tanya Phelps, in her own behalf and as natural guardian of her children, Tasha Phelps and Leanessa Phelps; Rita Samaniego, in her own behalf and as natural guardian of her children, Geraldo Wingate, Kristin Wingate, and Sarah Wingate; Felipe Sandoval, in his own behalf and as natural guardian of his children, Felicia Sandoval and Felipe Sandoval; Sally Shanahan, in her own behalf and as natural guardian of her children, Nathan Shanahan, Kaitlyn Shanahan, Gabriel Shanahan, and Jacob Shanahan; and Jeffry Flake and Trent Franks, as taxpayers.[1]

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[1] The Petition for Writ of Certiorari filed by petitioner Penny Kotterman, *et al.*, in No. 98-1716, incorrectly identifies Louis Rhodes as a respondent (Pet. ii). Petitioner Rhodes has filed a Petition for Writ of Certiorari in No. 98-1718.

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INTRODUCTORY STATEMENT

Believing that the Arizona School Tuition Organization Tax Credit Program, A.R.S. § 43-1089, represents sound and vitally important public policy, and that greater choice of elementary and secondary schools is necessary to fulfill our nation's guarantee of equal educational opportunities, respondents support the petitions for writ of certiorari in order to remove any lingering question about the constitutionality of parental school choice.[2]

Unfortunately, petitioners misapprehend the nature of a petition for certiorari and instead present a brief on the merits. Rather than re-arguing the case, respondents detail below the reasons why the petitions should be granted. Specifically, a clear and direct conflict has emerged between the Arizona and Wisconsin Supreme Courts and the Maine Supreme Court over the constitutionality of parental school choice under the First Amendment. This conflict emerges at a time of urgent need and growing determination to provide high-quality educational opportunities, particularly to economically disadvantaged and inner-city children. Increasingly, states are turning to parental choice as one means of expanding educational alternatives for children who desperately need them while creating a competitive incentive for

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[2] Although two petitions for writ of certiorari were filed, the arguments are largely redundant. All references to the petition herein are to the Petition for Writ of Certiorari filed by Penny Kotterman, *et al.*, in No. 98-1716, unless otherwise denoted.

improvement in public schools. The constitutional uncertainty surrounding parental choice has led to constant litigation and conflicting outcomes, all to the detriment of our nation's most vulnerable schoolchildren. The Arizona case provides an excellent opportunity for this Court to apply to parental choice the establishment clause principles it has carefully developed in recent cases.

STATEMENT OF THE CASE

An establishment clause challenge requires the Court to inquire into "the nature and the consequences of the program viewed as a whole." *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 492 (1986) (Powell, J., concurring). Unfortunately, petitioners have deliberately distorted the nature and context of the Arizona School Tuition Organization Tax Credit Program in an effort to transmute a constitutional program into an unconstitutional one. That effort begins by creating out of whole cloth a title for the program that appears throughout the Petition, the "Arizona Private School Tax Credit."[3] No such thing exists. The State of Arizona does not provide a tax credit for contributions to private schools, nor for expenses incurred in private schools. Of course, both federal and state law do provide income tax deductions for contributions to certain nonprofit organizations,

[3] A.R.S. § 43-1089 actually denotes the program as a "Credit for Contributions to School Tuition Organization."

including private schools, and exempts many such organizations from taxation. The challenged statute does not affect such deductions or exemptions.

Rather, A.R.S. § 43-1089 provides a credit against state income taxes of up to $500 for contributions to school tuition organizations (STOs). Such organizations must dedicate at least 90 percent of their revenues for scholarships given to children attending qualifying nongovernmental schools, chosen by their parents. The taxpayers claiming the credit may not designate the scholarship for use by their own dependents.

As petitioners acknowledge (Pet. 13-14 & n.4-n.7) and as the Arizona Supreme Court recognized, *Kotterman v. Killian*, 972 P.2d 606, 613 & n.2 (Ariz. 1999) (Pet. App. 10a-11a & n.2), the school tuition organization tax credit is one of many credits and deductions provided to Arizona taxpayers.[4] At the same time as the Arizona Legislature enacted the school tuition organization tax credit, for example, it also enacted A.R.S. § 43-1089.01, which allows a tax credit of up to $200 for fees paid in support of public school extracurricular activities. *See Kotterman v. Killian*, 972 P.2d at 613, 616 (Pet. App. 11a & 17a).

Moreover, the STO tax credit enhances an existing broad array of public school choices. *Id.* at 611 (Pet. App. 6a-7a). Any eligible student may attend any public school in the state without tuition. A.R.S. § 15-816.01(A). The

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[4] In November 1998, Arizona voters acting by popular initiative created an additional state income tax credit of up to $500 for contributions to a fund for political candidates. A.R.S. § 16-954(B).

state also has created innovative charter schools, which may be sponsored by private non-profit or for-profit entities, to "provide additional academic choices for parents and pupils." A.R.S. § 15-181. Under Arizona law, state per-pupil funding follows the child to the school of the parent's choice. A.R.S. § 15-901. The Arizona School Tuition Organization Tax Credit is only one facet of a wide variety of tax benefits and educational options available to the people of Arizona. As respondent Superintendent of Public Instruction Lisa Graham Keegan explains,

> the Educational Tax Credit Law is an important step toward remedying the educational access problem that students, particularly low-income students, currently face in this state. What the Educational Tax Credit Law does is to help children of modest means begin to gain access to the same range of educational opportunities that wealthier children enjoy; and through its public school credit provision, to provide resources to enrich the offerings of public schools.

Exh. A to Resp. of Intervenors/Respondents Keegan, *et al.*, to Petition for Special Action, ¶ 11.

The parent respondents put the matter even more tangibly. The McCoys have a large family comprised of 14 natural, adopted, and foster children. Their first four children attended public schools, but the McCoys were not satisfied with their education. Though Baptists, they send all nine of their school-age children to St. Matthew's, a Catholic school. As the McCoys explain,

> We think a child's education is the most important thing for their success in life. We will

> do whatever it takes to give our children the best education that we can. . . .
>
> Although we wanted to keep all of our children in private school, during some unexpected hard times, we had to take them out of the private school because we could not afford the tuition. They are all back in private school now and we intend to keep them there. However, we are afraid that if Alfreda cannot find a job by next year we will have no choice but to send them back to the public school again.

Id., Exh. C, ¶ 15, 17; *see also* Exhs. B, D, E, F, and G. The McCoys have applied for scholarships from respondent Arizona School Choice Trust. *Id.*, Exh. C, ¶ 14. Their circumstances exemplify the high human stakes in this litigation.

REASONS FOR GRANTING THE WRIT

I. A CLEAR AND DIRECT SPLIT OF AUTHORITY EXISTS BETWEEN THE ARIZONA AND WISCONSIN SUPREME COURTS AND THE MAINE SUPREME COURT OVER THE CONSTITUTIONALITY OF PARENTAL SCHOOL CHOICE UNDER THE ESTABLISHMENT CLAUSE.

Parental school choice, encompassing private schools among the range of educational options, presents a classic example of innovative policy experimentation at the state level that is a hallmark of our system of federalism. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). Wisconsin and Ohio have enacted programs that allow low-income youngsters in urban school districts to use a share of their public education

funds in private nonsectarian and religious schools. Wis. Stat. § 119.23; Ohio Rev. Code Ann. §§ 3313.974-3313.979. Florida has just passed a statute that allows children in failing public schools to attend other public schools or private schools at state expense. Fla. Stat. ch. 229.0537. In certain communities in Maine and Vermont, no public schools were ever built, and instead students are "tuitioned" to public schools outside their districts or to nonsectarian private schools chosen by their parents. Me. Rev. Stat. Ann. tit. 20-A, § 5204(4); Vt. Stat. Ann. tit. 16, § 822. Some states provide state income tax deductions or partial tax credits for tuition expenses. Iowa Code § 422.12(2); Minn. Stat. § 290.01, subd. 19b(3). Some states allow academically at-risk children to attend private schools, Wis. Stat. § 118.153, or for certain public high school students to take college courses at state expense in private or public postsecondary institutions. Wis. Stat. § 118.55. And, of course, under the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, this Court has determined that where local public education agencies default on their obligation to provide a "free appropriate public education" to a particular student, that child may attend private school at public expense. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985). Arizona is the first state to provide state income tax credits for contributions to private scholarship programs; but the common policy premise in all of these programs is the same: each recognizes that the goals of public education often can be achieved outside of public schools.

This Court has examined analogous programs that include private and religious schools in a variety of contexts. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (sustaining tuition tax deductions); *Witters, supra* (upholding the use of postsecondary public grants for use by a student attending divinity school); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing the public provision of an interpreter for a deaf student attending a Catholic high school); *Agostini v. Felton*, 521 U.S. 203 (1997) (sustaining the provision of public remedial teachers in religious schools). The Court summarized the applicable principles in *Agostini, id.* at 231, stating that such efforts do not offend the establishment clause where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

The first two state supreme courts to consider contemporary parental choice programs in the establishment clause context faithfully applied this Court's precedents. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 466 (1998), the Wisconsin Supreme Court upheld the Milwaukee Parental Choice Program against a variety of constitutional challenges, including the establishment clause. Distilling the principles set forth in this Court's jurisprudence, the Wisconsin Supreme Court stated that "state educational assistance programs do not have the primary effect of advancing religion if those programs provide aid to both sectarian and nonsectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a

result of numerous private choices of the individual parents of school-age children." *Id.* at 617. The Court observed that the Milwaukee Parental Choice Program exists against the backdrop of a wide range of publicly supported educational options, the vast majority of them involving public schools. *Id.* at 618 n.16. Accordingly, the Court concluded that the parental choice program does not violate the establishment clause, because it "places on equal footing the options of public and private school choice, and vests power in the hands of parents to choose where to direct the funds allocated for their children's benefit."[5] *Id.* at 619.

Likewise, the Arizona Supreme Court below accurately applied this Court's precedents. Finding *Mueller v. Allen* most applicable, the Court found that the tax credit here was only one among many provided by the state for a variety of purposes, *Kotterman v. Killian*, 972 P.2d at 612-13 (Pet. App. 8a-11a);[6] and that funds reach religious

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[5] An Ohio Court of Appeals reached a contrary result with respect to a similar program in Cleveland. *See Simmons-Harris v. Goff*, No. 96APE08-982, 1997 WL 217583 (Ohio Ct. App. May 1, 1997). That decision is on appeal to the Ohio Supreme Court.

[6] Petitioners inventively suggest that the distinction between the scholarship tax credit and other tax credits provided under Arizona law is that the latter are designed to encourage private parties to "engage in socially desirable private actions" (Pet. 13). Contrary to petitioners, we certainly would argue that contributions to scholarship funds are extremely socially desirable. But that disagreement is beside the point because the State of Arizona, acting through its elected representatives, has definitively made that policy decision.

schools only through "multiple layers of private choice."[7] *Id.* at 614 (Pet. App. 13a). In sum, the Court concluded that the tax credit "is completely devoid of state intervention or direction and protects against the government 'sponsorship, financial support, and active involvement' that so concerned the framers of the Establishment Clause." *Id.* (Pet. App. 14a) (*citing Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

Up until the Friday preceding the Monday filing of the petitions for writ of certiorari in this case, there was no clear and direct split in authority among state supreme courts on the constitutionality of parental school choice under the establishment clause. But the Maine Supreme Court decision in *Bagley v. Raymond Sch. Dep't*, No. 1999 ME 60, 1999 Me. LEXIS 72 (Me. Apr. 23, 1999), creates such a split, underscoring the necessity of review by this Court.[8] Approximately half of Maine's school districts provide some or all of their public education by "tuitioning" students to public schools in other districts or private schools chosen by parents. Prior to 1981, religious schools were included in the range of choices; but based upon an interpretation of the establishment clause, the Legislature subsequently excluded religious schools from the available options. Families who are eligible for

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[7] Petitioners assert erroneously (Pet. 14) that the scholarship is a "substitute for direct legislative appropriations." Plainly it is not. Unlike an appropriation, not a single dollar flows anywhere unless directed by the voluntary, independent choice of an individual taxpayer.

[8] The Institute for Justice, which represents respondents here, also represents the plaintiffs in *Bagley*. A petition for writ of certiorari in that case will be forthcoming.

tuitioning but who enrolled their children in religious schools challenged the exclusion under the free exercise, establishment, and equal protection clauses of the First and Fourteenth Amendments. The Maine Supreme Court acknowledged that the state was required to justify its discrimination, and that its only justification was compliance with the establishment clause.[9] *Bagley*, 1999 Me. LEXIS 72, at *29. Largely ignoring the most analogous precedent of this Court, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and purporting to apply *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Maine Supreme Court concluded that it would violate the establishment clause to include religious schools among the tuitioning options.[10] The Court

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[9] Issues relating to the inclusion or exclusion of religious schools from generally available educational benefits also have arisen in the contexts of special education, postsecondary education, and supplemental K-12 programs with conflicting results underscoring the confusion in this area. Compare *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998) (holding that the establishment clause requires the exclusion of pervasively sectarian colleges and universities from state higher education grant program) and *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998) (upholding parish school board's provision of special education services to students at private religious schools but striking down as unconstitutional religious school participation in federal Chapter 2 educational and instructional materials program) with *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (holding school district's refusal to provide special education services at a private religious school to be unconstitutional) and *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995) (upholding religious school participation in Chapter 2 program).

[10] *Bagley* also conflicts directly with *Campbell v. Manchester Bd. of Sch. Directors*, 641 A.2d 352 (Vt. 1994), allowing the

based its opinion on the grounds that the state's payments are made payable directly to the schools and that secular and religious instruction in the religious schools is not segregated. *Bagley*, 1999 Me. LEXIS 72, at *49-62. The Maine Supreme Court acknowledged that courts in other states had upheld general financial assistance programs including religious schools (citing, among other cases, the decision here), but concluded that "they do not provide persuasive authority for interpretation of the Establishment Clause. The Supreme Court has not yet reviewed any of these programs, and it is not clear which of them, if any, would be found to pass muster under an Establishment Clause analysis." *Id.* at *49.

Respondents believe that in its cases, spanning the last 16 years, this Court has clearly set forth the establishment clause framework within which parental school choice should be analyzed. The Wisconsin and Arizona Supreme Courts have carefully and appropriately applied that framework. Other courts, however, have not.

The present case provides a suitable vehicle to resolve the conflict. Both sides agreed that the case could

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inclusion of religious schools in Vermont's tuitioning program, which is functionally similar to Maine's. A Vermont trial court, however, has refused to extend the *Campbell* decision, which dealt with reimbursement of tuition to parents who had sent their children to religious schools, to the context of prepayment of religious school tuition, holding that such payments would violate the establishment clause. *Chittenden Town Sch. Dist. v. Vermont Dep't of Educ.*, No. S0478-96 RcC (Vt. Superior Ct., Rutland Cty., June 27, 1997). That case is pending on appeal to the Vermont Supreme Court.

be resolved upon the complete yet concise record presented to the Arizona Supreme Court. The constitutional issues presented by parental choice are transcendent and cleanly presented in this case. Moreover, the juxtaposition of competing principles set forth in the majority and dissenting opinions serves to sharply delineate the issues. The conflict over the constitutionality of parental choice begs resolution by this Court.

II. THE CENTRAL AND CRUCIAL ROLE PARENTAL CHOICE PLAYS IN SYSTEMIC PUBLIC EDUCATION REFORM EFFORTS AROUND THE NATION WILL BE PLAGUED BY LITIGATION UNTIL THIS COURT REMOVES LINGERING CONSTITUTIONAL DOUBT.

Though our nation has made remarkable strides in fulfilling the promise of equal educational opportunities, *see Brown v. Board of Educ.*, 347 U.S. 483 (1954), that progress is painfully uneven. For millions of low-income, predominantly minority schoolchildren, the dream of a quality education too often is illusory. The typical black high school senior scores four academic years behind the typical white senior – a gap that has widened substantially over the past decade. *See* Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 355 (1997). As a whole, America's elementary and secondary school system lags far behind many other industrialized nations. *See* Diane Ravitch, "Our School Problem and Its Solutions," *City Journal*, Winter 1999, at 33-41.

Increased parental choice and competition, both among and outside public schools, is increasingly viewed

as essential to achieving the goals of public education, particularly for low-income, inner-city youngsters. *See, e.g.*, Floyd H. Flake, "School Choice: Why Poor Kids Need It Most of All," 2 *Am. Experiment Q.* 35 (1999); Andrew Young, "Let Parents Choose Their Kids' Schools," *Los Angeles Times*, (April 29, 1999) at B9; Clint Bolick, *Transformation: The Promise and Politics of Empowerment* 34-61 (1998). Although the contours differ, all contemporary parental choice programs, including the one at issue here, share certain common features: (1) funds are placed at the disposal of parents in the form of vouchers, scholarships, tax credits, or tax deductions; (2) private schools are added to the range of public school options; and (3) aid is targeted to economically disadvantaged youngsters. Strong evidence exists that such youngsters often perform better outside of traditional public schools. *See, e.g.*, Paul E. Peterson & Bryan C. Hassel, eds., *Learning from School Choice* (1998); Derek Neal, "The Effects of Catholic Secondary Schooling on Educational Achievement," 15 *J. Labor Econ.* 98 (1997).

Accordingly, efforts to expand parental choice are proliferating around the nation. Approximately 40 state legislatures this year are considering aid programs, tax credits, or other parental choice measures encompassing private schools among the options. *See* Julie Flaherty, "Maine's High Court Rejects Families' Bid to Use Vouchers for Religious School," *New York Times* (Apr. 28, 1999) at B11.[11] In April, the State of Florida's Legislature

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[11] Specifically, according to petitioner Rhodes, tuition tax credit legislation is pending in at least 14 state legislatures (Rhodes Pet. 22 n.12).

passed the nation's first statewide parental choice program, allowing children in failing public schools to opt out to better public schools or eligible private schools, as part of a broader program of public education reform emphasizing standards and accountability. *See* Linda Kleindienst, "Florida Passes First Statewide Voucher Plan," *Sun-Sentinel (Fort Lauderdale, Fl.)* (May 1, 1999) at 1A. And in May, the Illinois Legislature passed a $500 tax credit for tuition and other educational expenses that will soon be signed into law. *See* Michelle Brutlag & Christi Parsons, "School Tax Credit Soon To Be Law," *Chicago Tribune* (May 13, 1999) at 5. Meanwhile, private philanthropy increasingly is targeted toward expanding educational options for economically disadvantaged youngsters through scholarships. Recently, approximately 1.25 million children nationwide applied for 40,000 scholarships made available by the Children's Scholarship Fund. *See* Joseph A. Califano, Jr., "A Gauge of Distress Within Public Schools," *San Francisco Chronicle* (May 6, 1999) at A27. Obviously, the Arizona School Tuition Organization Tax Credit Program would further foster such private philanthropy.

Litigation against parental choice programs, however, has become as inevitable as death and taxes, as reflected by the lawsuits in Ohio, Wisconsin, and Arizona. Even before Governor Jeb Bush has signed the Florida program into law, anti-parental choice groups have vowed a court challenge. *See* Mike Clary, "Florida To Be First To Launch Statewide School Vouchers," *Los Angeles Times* (April 29, 1999) at A1.

The omnipresent litigation casts a pall upon efforts to expand educational choices for children who desperately

need them. Given the dire crisis facing many of this nation's public schools, now is the time for this Court to remove the constitutional uncertainty surrounding school choice.

CONCLUSION

We urge this honorable Court to grant the petitions in this case and to resolve the constitutional question in favor of parental choice.

Respectfully submitted,

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MOTION FILED
MAY 2 6 1999

No. 98-1716; 98-1718

In the
Supreme Court of the United States
October Term, 1998

PENNY KOTTERMAN, et al., Petitioners,
v.
MARK KILLIAN, et al., Respondents

LOUIS RHODES, Petitioner,
v.
MARK KILLIAN, Respondent

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF ARIZONA

MOTION AND BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE*

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ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF ARIZONA

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National School Boards Association (NSBA) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Petitioners in *Kotterman v. Killian* (No. 98-1716) have consented to NSBA's

participation in this matter. A letter attesting to their consent has been submitted to this Court.

NSBA has a longstanding interest in educational policy and has been a frequent contributor of *amicus* briefs in this Court on many issues including: *Plyer v. Doe*, 457 U.S. 202 (1982) (equal protection – undocumented alien students); *Rowley v. Board of Education*, 510 U.S. 1202 (1982) (IDEA – educational methodology); *Washington v. Seattle Public Schools*, 458 U.S. 457 (1982) (equal protection – voluntary desegregation); *Board of Education of Paris v. Vail*, 466 U.S. 377 (1984) (procedural due process – "property" interest in continued employment); *Irving Independent School Dist. v. Tatro*, 469 U.S. 809 (1984) (IDEA – related services); *New Jersey v. T.L.O.*, 469 U.S. 325 (1984) (Fourth Amendment – student search and seizure); *Smith v. Robinson*, 464 U.S. 932 (1983) (IDEA – attorneys' fees); *Oklahoma v. Gay Task Force*, 470 U.S. 903 (1985) (teacher free speech – statute forbidding speech outside school on subject of gay rights); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532

(1985) (procedural due process – teacher's right to pre-termination hearing); *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (Civil Rights Act of 1964, Title VII – accommodation of teacher's religious beliefs); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (First Amendment student free speech); *Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers – legislative veto); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986) (teacher free speech – damages); *Wygant v. Jackson Board of Education*, 478 U.S. 1014 (1986) (equal protection – layoffs on basis of race to promote "role models"); *School Board of Nassau County v. Arline*, 481 U.S. 1024 (1987) (Section 504 of the Rehabilitation Act of 1973 – teacher with infectious disease); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (student free speech – school newspaper); *Honig v. Doe*, 484 U.S. 305 (1988) (IDEA – removal of violent disabled student); *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189 (1989) (substantive due process – duty to protect child from parents/guardians); *Board of Education of Westside*

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Because this case has such direct bearing on how state legislatures will resolve this educational issue, NSBA respectfully requests the opportunity to advise this Court on this matter.

Respectfully submitted,

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BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Petitioners in *Kotterman v. Killian* (No. 98-1716) have consented to the filing of this brief.[1] Their consent is on file with the Clerk.

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[1] This brief was written by National School Boards Association (NSBA) who is *amicus curiae* before this Court and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U. S. Virgin Islands. NSBA represents the nation's 95,000 school board members. These board members govern more than 15,000 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the Establishment Clause.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioners.

ISSUE PRESENTED FOR REVIEW

Does the Arizona tax credit violate the Establishment Clause of the First Amendment to the United States Constitution?

REASONS FOR GRANTING THE WRIT

I. This case raises Establishment Clause concerns of the first order requiring clear direction from this Court on the constitutional limitations on direct public funding of religious educational institutions.

The heart of the question is whether the Establishment Clause requires a subsidy to parents/guardians of children who attend religious schools. The Establishment Clause does not require a public subsidy for religious education – it prohibits it.

This Court has held that, "The clearest command of the Establishment Clause is that one religion cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Equally important, the Establishment Clause prohibits favoritism to any religion.

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, e.g., *Texas*

> *Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989). *See also* D. Laycock, *Nonpreferential Aid to Religion - A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1991).

This Court, in previous cases has dealt with the issue of public funding of religious education. In these cases, this Court has held that the Establishment Clause does not allow direct public funding of religious education. *E.g.*, *PEARL v. Nyquist*, 413 U.S. 756, 788 - 89 (1973); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

Neither is the state required to provide such equal expenditures on religious education as a part of a free exercise claim. In *Leutkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), parents/guardians of parochial

school students challenged Missouri's refusal to provide them with free bus transportation while providing such transportation to public school students. Citing *Brusca v. State*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), the three judge court rejected the claim. *Accord Witters v. Washington Dept. of Services for the Blind*, 112 Wa.2d 363, 771 P.2d 1119, *cert. denied*, 493 U.S. 850 (1989).

Recall Justice Souter's words in *Agostini v. Felton*, 521 U.S. 203 (1997), we tend

> to forget the hard lessons, and to overlook the history of governmental partnership with religion when ... bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

521 U.S. at 244 (Souter, J. dissenting).

II. The Court's immediate guidance is imperative given the substantial state legislative activity involving public funding of private education.

The issue of public funding for private education is of increasing frequency in state legislatures. There is substantial state

activity in the form of tuition voucher and tax credits. Current proposals and actions are summarized below:

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
AZ	State tax code allows residents to claim a tax credit of up to $500 for donations to charitable organizations that provide scholarships to students to attend private or religious schools (tax credit also applies to up to $200 of activity fees at public schools within the state).	Suit brought challenging tax credit law on Establishment Clause grounds. *Kotterman v. Killian*, No. C-B-970412-SA. Oral arguments presented to Arizona Supreme Court in December 1997. State supreme court decision on 1/27/99 upheld constitutionality of tax credit. Petition for *certiorari* was filed with U.S. Supreme Court on 4/26/99.
CO	No private school vouchers.	Class action suit brought in 1997 by parents claiming Denver school system has failed to teach poor and minority students basic skills. Plaintiffs are seeking tuition vouchers for use in either public or private schools as a remedy. Suit was dismissed and is being appealed to state court of appeals. Tuition tax credit program initiative on the 11/3/98 statewide ballot. Tax credit would be available to families who transfer children from a below-average public school to a private school. Program would be funded by the savings in tax dollars that result from students leaving the public school system for private schools. The initiative was rejected by voters 60% to 40% in the November elections.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
FL	Private school vouchers to be provided to students at the four lowest performing schools in the state.	Voucher bill passed in state house and senate 4/30/99.
IA	Parents of private school students who are not provided with state transportation are entitled to reimbursement for transportation costs via state's transportation voucher program (the program has survived several legal challenges). Parents of private school students are also entitled to take a tax deduction of up to $1,000 per child in school with a limit of four per family. In May 1998 governor signed tuition tax credit bill into law that increased the state's tax credit from $100 to $250 on the first $1,000 of tuition expenses. The law also expands the definition of allowable tuition and textbook expenses to include expenses related to extracurricular activities.	No pending legislation or cases.
ME	No private school vouchers for religious schools. State's 200 year old law provides students in rural areas lacking public schools with tuition vouchers for use in enrolling in either nonreligious private or public schools.	On April 23, 1999 the Maine Supreme Judicial Court in a 5 to 1 decision affirmed the lower court's holding that Maine's education tuition program, which excludes the use state funds for religious school tuition, does not violate the Free Exercise, Establishment or Equal Protection Clauses of either the U.S. or Maine Constitution.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
MA	No private school vouchers.	In 1998 parents of Catholic school students filed suit against the state in federal district court, challenging the state constitution's 1854 amendment prohibiting the use of public funds for religious schools as violating their free exercise of religion rights under the U.S. Constitution (*Boyette v. Galvin*, No. 98-10377, status: pretrial).
MN	Existing state tax code provision allowing families of public school students to take a tax deduction for school expenses, including required clothing, textbooks, and other supplies, was amended in 1997 to include families of private and religious school students. The amounts deductible were increased from $1,000 to $2,500 for 7-12 grades, and from $650 to $1,625 for K-6 grades. In addition, the definition of expenses was expanded to include summer school, camps, tutoring, p.c. hardware, and educational software. The amendment also provides families with incomes of $33,500 or less with a refundable education tax credit of $1,000 per child, limit of two per family (amended tax deduction amounts are effective as of 1998 state income tax returns).	No pending legislation or cases.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
MS	No private school vouchers.	Governor proposed ballot initiative called the People's Right to Initiate Model Education (PRIME) Act which would give citizens the right to propose changes in school management to local boards. If the change is rejected by the school board, it can be submitted directly to the voters. The proposal would allow local communities to adopt voucher programs. PRIME received the required number of petition signatures to appear on the 1998 state ballot but failed to pass.
MO	No private school vouchers.	In 1998 a bill was defeated in the state legislature which would have funded scholarships of $2,500 to $3,000 for students, whose families are 200% of the poverty line, for use at a school of choice or for tutoring expenses.
NH	No private school vouchers. However, under state law rural school districts are permitted to use local tax revenue to send students to nearby public or private schools.	In 1997 and 1998 bills proposed in state legislature to allow school districts to vote on reimbursing parents for public, private, or home schooling tuition costs were defeated.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
NY	No private school vouchers.	1998 bill, providing tax credit to persons donating money to private scholarship programs, failed in state legislature.
OH	In 1996 state began two year pilot voucher program for Cleveland. Ohio was the first state to enact a voucher program that includes religious schools. It provides scholarship funds up to $2,500; low income students are eligible for 90% of tuition costs, all others 75%. In 1998 the program was amended to require the Cleveland School District to provide scholarship program students with transportation.	In July 1996 the AFT filed suit challenging the constitutionality of the voucher program. Franklin County Court of Common Pleas ruled that the program did not violate either the U.S. or state constitution's establishment clause on the grounds that sectarian schools benefited only indirectly and as a result of parents' independent private choices. In May 1997 the Ohio Court of Appeals reversed (3-0), finding both the U.S. and state constitutions' establishment clause had been violated. The Ohio Supreme Court granted a stay, allowing the program to continue pending the outcome of the appeal. During the stay the program has been increased from 2,000 to 3,000 students. Oral arguments were heard on 9/28/98. Decision pending.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
PA	No private school vouchers.	Southeast Delaware County School Board implemented a private school voucher program, including religious schools, available to any school district student. A coalition, lead by the PSEA, filed suit against the school district. The PSEA challenged the program's constitutionality. The court granted the PSEA's motion for judgment, ordering the school district to scrap its voucher plan. However, the court did not address the issue of the plan's constitutionality, instead holding that the school board did not have the authority to spend state taxpayer money on private schools.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
TX	Houston School District implemented voucher program in response to school overcrowding and local taxpayers' rejection of bond measures at the polls. The plan allows students from overcrowded schools to attend area private schools at the school district's expense. In 1998 it amended the plan to allow academically failing students at low performing schools to enroll in approved private, nonreligious, schools.	
VT	Under state law, students in towns without public schools may attend public or approved private schools at state expense. A 1961 state supreme court ruling prohibits students from attending religious schools.	In 1996 the town of Chittenden filed suit to ensure state funds would continue to be available to send its high school students to schools outside the community, after the state refused to allocate the funds to the town because some students stated their intention to attend religious schools. In 1997 the Rutland County Superior Court denied the town's request for state funds for religious school tuition. The case was appealed to the state supreme court which heard oral arguments on 3/10/98. Decision pending.

STATE	VOUCHER STATUS	PENDING LEGISLATION/CASES
WI	Milwaukee Parental Choice Program (MPCP) provides vouchers to parents of low income students in the Milwaukee school system to be used for private school tuition, including religious schools. The program has survived two court challenges to its constitutionality in the state courts, the last coming after it was amended to include religious schools.	In 1998 the state supreme court ruled in *Jackson v. Benson* that the MPCP did not violate the First Amendment Establishment Clause because the benefit to religious schools is indirect and results from independent choices made by participating parents. A coalition lead by the WEA filed a petition of *certiorari* with the U.S. Supreme Court on 8/31/98. The petition for *certiorari* was denied on 11/9/98.

CONCLUSION

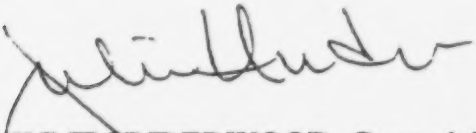
When religious schools arose, they were dedicated to a mission to inculcate and proselytize in addition to teaching important educational lessons of the day. It remains that way. It has been an impenetrable and important wall that has kept public money from flowing to religious schools.

Those with a religious agenda must pay the freight for animating their belief in private and parochial schools – and cannot advance their private faith on the public treasury. This Arizona tax credit is a wink and a nod to the very clear and explicit prohibition against religious school financial support. This is a transparent shell game that seeks to misdirect the scrutinizing gaze. The Establishment Clause will not tolerate or accommodate such subterfuge.

This plan and others like it cropping up around the country, violate the bedrock principles of the First Amendment. Taking this case and reversing the course of events gaining headway in

legislatures coast-to-coast, would bring clarity and reaffirm the concept that public money belongs to truly public schools.

Respectfully submitted,



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Nos. 98-1716 and 98-1718

Supreme Court, U.S.
FILED
JUN 18 1999
CLERK

IN THE

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,
Petitioners,
v.
MARK W. KILLIAN, *et al.*,
Respondents.

LOUIS RHODES,
Petitioner,
v.
MARK W. KILLIAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

BRIEF IN OPPOSITION OF RESPONDENT ARIZONA SCHOOL CHOICE TRUST, INC.

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STATEMENT OF THE PARTIES

The parties, Petitioner and Respondent, are fully set forth in the Petitions, pps. ii.

Pursuant to Supreme Court Rule 29.6, the Respondent Arizona School Choice Trust, Inc. does not have any parent or subsidiary corporations, but has an associated 501(c)(3) private non-profit corporation, Arizona School Choice Administration Corporation.

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BRIEF IN OPPOSITION OF RESPONDENT ARIZONA SCHOOL CHOICE TRUST, INC.

INTRODUCTORY STATEMENT

In this case the Arizona Supreme Court has upheld the constitutionality of a tax credit up to $500.00 against income taxes payable, granted to contributors to a private school tuition tax exempt organization under Internal Revenue Code Section 501(c)(3). The Court did so with a very clear and careful interpretation and application of the three-part principles of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The decision also carefully considered and applied *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973) and *Mueller v. Allen*, 463 U.S. 388 (1983). There is no case whatsoever with which the decision here conflicts. Although Petitioners, and the Keegan Respondents attempt to paint this decision as one having broad implications for "school choice" legislation, it does not. It is an opinion which stands upon applicable Arizona constitutional and statutory provisions relating to education in Arizona; and upon a tax credit provision, a tax bill, Ariz. Rev. Stat. Ann. § 43-1089 and § 43-1089.01 (which were adopted together). There is no reason that this case need be reviewed. It will provide virtually no broadly-applicable clarification of Establishment Clause jurisprudence the Court might now believe to be necessary. The area in which it appears that this Court's attention may be required is for cases involving direct aid, such as school vouchers, or the direct provision of equipment or subsidy by the state through its revenues to private sectarian schools. Again, that is not this case.

STATEMENT OF THE CASE

In Arizona, the state is mandated by Constitution to provide education to the children of Arizona, "as nearly free as possible." Ariz. Const. Art. XI, Section 6. This

means that students cannot be charged fees for their education in the public schools. *Id.*; Arizona Attorney General Opinion 194-004, Arizona 1994. In addition, the state in turn requires that all children obtain education. Ariz. Rev. Stat. Ann. §§ 15-802 and 15-803.

For almost all of its history, Arizona discharged its responsibilities to educate its children through public schools built and operated by school districts. It has funded the expenses of those schools through *ad valorem* property taxes assessed by individual school districts, by revenues from state imposed sales taxes, and by revenues derived from state income taxes. Until very recently, a school district could charge tuition for any student it enrolled from outside its district.

Five years ago, the state adopted legislation establishing charter schools in order to "provide additional academic choices for parents and pupils." Ariz. Rev. Stat. Ann. § 15-181 (1994). More recently, the legislature of Arizona specified that children be allowed open enrollment to schools in any district without being charged tuiton. Ariz. Rev. Stat. Ann. § 15-816.01(A) (1995). It was against this backdrop of evolving methods of providing education, always having to comply with the dictate that no fees could be charged to school children (and by extension, their parents), that the tax credit legislation at issue in this case was adopted.

Respondent Arizona School Choice Trust, Inc., (hereinafter "School Choice Trust") was established in 1992. Affidavit of John F. McVaugh, Jr., Appendix B to Response of Intervenor's Keegan, to Petition for Special Action (hereinafter "McVaugh Affidavit"). It is a private non-profit corporation established to provide privately funded scholarships for Arizona school children to attend the kindergarten or elementary school of their choice. School Choice Trust is a properly qualified non-profit organization, pursuant to Section 501(c)(3) of the

Internal Revenue Code of the United States. School Choice Trust is not affiliated with any religious organization or with any school. School Choice Trust was established because of its founders' "strong belief that real education reform will occur when parents are empowered to make educational choices for their children." McVaugh Affidavit.

When this case was brought before the Arizona Supreme Court, School Choice Trust was the only would-be school tuition organization within Arizona conducting a scholarship program. The record in that court demonstrated that scholarship funds available to School Choice Trust fell woefully short of meeting the demand for them. So, School Choice Trust decided at first to provide scholarships only for three years, but was unable to cut off those scholarships when that period ended. McVaugh Affidavit. Therefore, it committed to parents that it would continue providing scholarships as long as resources were available. Because of limited resources, at the time the case was before the Arizona Supreme Court, School Choice Trust was only able to provide scholarships in grades K-8. Many parents "beg us to continue the scholarships into high school, but we simply cannot afford to do so." McVaugh Affidavit, ¶ 6. School Choice Trust awards scholarships on a "first come first served" basis, and at the time of the litigation in Arizona, School Choice Trust had a waiting list of approximately 800 students. School Choice Trust has experienced an increase in demand for scholarships since the legislature passed the educational tax credit law. *Id.* at ¶ 8.

The names of the 800 students on the waiting list were coded for either public or private school,[1] but not by

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[1] Remembering that School Choice Trust was established in 1992, and that tuition free, open enrollment for Arizona public school districts was not adopted until 1995, explains the necessity for such public versus private school classification.

race, religion, national origin, or familial status—at no time are applicants asked to disclose those facts. *Id.* at ¶ 9. The waiting list of applicants for scholarships is entirely unaffected by the individual school preferences of the child or the parents. Only if a scholarship becomes available, and the family is still interested, do the parents or guardians receive a longer application form, (Exhibit 3, McVaugh Affidavit), in which the parents are asked to indicate for the first time the school that their child hopes to attend. *Id.*, ¶ 10.

School Choice Trust plays no role in selecting the school that the recipients will attend. Usually, the families have already selected a school for their child. They will generally pick schools in their neighborhood. They will at other times choose schools where family members or friends send their children. McVaugh Affidavit, ¶ 12. The Petitioners focused upon the religious missions of the estimated 72% of private schools (or at least some selected publicly available mission statements and informational materials from a "sampling" of sectarian schools that were submitted to the Arizona Supreme Court), as the basis upon which to argue that the purpose of the private school tuition organizations' scholarships is to advance religion. However, School Choice Trust experienced a mix of different motivations cited by parents as criteria they used in selecting their children's schools. Parents named academic rigor, small class size and individual attention, religion, and discipline/order/safety as their top reasons to select a given school. McVaugh Affidavit, ¶ 15.

In 1997, the Arizona legislature adopted a bill providing tax credits to all taxpayers of the state of Arizona, for two different categories of payments or donations—donations to school tuition organizations and payments for public school extracurricular expenses. When these tax credit laws were enacted, no child attending a public

school could be charged tuition or fees for basic schooling. This was true irrespective of whether the child attended school in her own district, enrolled in another district pursuant to the "open enrollment" statute, or matriculated at a charter school. Thus, to adopt a tax credit for public school tuition would have been an empty gesture by the legislature. The first half of this tax enactment is quoted by both petitions in the "statutes involved" section of their petitions. The second half, dealing with tax credits for public school expenses, are briefly mentioned and discussed even though it was a major portion of the 1997 School Tax Credit bill.[2] The public school expense tax credit became Ariz. Rev. Stat. Ann. § 43-1089.01. It specified:

> A. For taxable years beginning from and after December 31, 1997, a credit is allowed against the taxes imposed by this title for the amount of any fees paid by a taxpayer during the taxable year to a public school located in this state for the support of extracurricular activities of the public school, but not exceeding $200.00.

In 1997, the state rate schedule to which tax credits would apply ranged from 2.9% of taxable income of up to $10,000.00, to a marginal rate of 5.17% of the amounts over $150,000.00. Ariz. Rev. Stat. Ann. § 43-1011 (West 1997). It is thus understandable that if the legislature wanted to accomplish substantial benefit to education derived from donations to private school tuition organizations, or for payments of public school fees for extracurricular activities, it would logically do so with a tax credit rather than a deduction. The making of a

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[2] The Kotterman Petition first refers to the public payment credit, on page 14 of its Petition, at the end of a footnote listing for the Court four different credits to taxpayers by the Arizona Tax Code of 100% of payments made for particular purposes. The Rhodes Petition similarly downplays the public school expense tax code.

$500.00 contribution would, if recognized as a deduction rather than a tax credit, provide a benefit of from only $14.50 (for an individual with $10,000.00 of taxable income) to $25.85 of monetary incentive (for an individual taxpayer at $150,000.00). Because of the very low income tax rate applicable in the state of Arizona, the selection of a tax credit instead of a deduction, for a desired policy decision to promote parents' choice in education was very logical and compelling.[3]

Petitioners necessarily based their attacks upon the school tax credit, in the court below, on a record describing school conditions, activities and behaviors of students, parents, school tuition organizations, donors, and others involved in education, all prior to the tax credit statute becoming effective. As the Arizona Supreme Court observed, Rhodes Pet. A-16,[4] no one knows what effect operation of the tax credit may have upon the prospects for additional secular private schools, and therefore for tax credits being claimed based upon donations which never benefit sectarian schools, even indirectly. As already indicated, the demand for scholarships to non-governmental schools from the School Choice Trust is very strong. School Choice Trust aspires to expand and help many more students in the state, and to provide scholarships for high school students as well as for primary school students. McVaugh Affidavit, ¶ 16. As then-head of

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[3] Petitioner Rhodes characterized the effect of this tax credit legislation as being larger, by also discussing the benefit that would flow to a federal taxpayer, who would receive a deduction, and therefore a larger benefit at the federal level because of the much higher applicable tax rates in the Internal Revenue Code. Of course, they do not argue, nor could they, that there is anything wrong with granting a deduction—either federal or state—for contributions made to 501(c)(3) organizations, whether they be religious or otherwise. *Walz v. State Tax Commission*, 397 U.S. 664 (1970).

[4] When discussing the opinion of the Arizona Supreme Court in this case, references to appendix pages are always to the *Rhodes* Petition, No. 98-1781.

School Choice Trust, McVaugh testified in his affidavit to the Arizona Supreme Court:

> I have a tremendous amount of respect for the families that seek out our scholarships. They will go to great lengths to guarantee that their children have the educational tools necessary to succeed. I believe that the educational tax credit will help these parents achieve that goal, by enabling them to find the resources necessary to secure a quality education.

McVaugh Affidavit, ¶ 17.

Thus, what Arizona has done, as the then-most recent step to improve education of its citizens, was the following:

> 1. Add the private school tuition-donation tax credit and the public school-expense tax credit, to its existing tax code and existing tax credits for other purposes, amounting to part or all of the amount expended;
>
> 2. Thereby add to (not create) the impetus for any Arizona taxpayer to make the payment for public school expenses; or to make a charitable contribution to private school tuition organizations, for scholarship funds;
>
> 3. Thereby to stimulate a growth in the funds available to private school tuition organizations, for use in granting scholarships to students desiring to attend private schools, secular and sectarian alike; and
>
> 4. To alleviate the burden, upon parents, of their children's attendance at private schools, secular and sectarian alike, which burden would not exist at all were they to send their students to a public school in their own district; a public school in another district; or a chartered (i.e. non-governmental but public) school.

No monies from the Arizona Dept. of Revenue go to the School Choice Trust organization. No money from the Arizona Dept. of Revenue's accounts go to the chil-

dren who attend private schools, nor to their parents. And no funds from the Arizona Dept. of Revenue accounts go to any secular or sectarian private schools attended by children who receive scholarships from school tuition organizations.

This action was brought before the Arizona Supreme Court directly, under a special procedure for direct intervention by that court, in cases of significant public importance. *See* Respondent Arizona Dept. of Revenue's Brief in Opposition, p. 6, n.6 (hereinafter "State's Brief"). The record before that court consisted of affidavits and exhibits.

The Petitioners comprised a group of citizens and taxpayers, presumably allied with the views of the entities identified with their cadre of counsel (*see* Petitions, cover). They directed their action against the Arizona Dept. of Revenue. Most of the Respondents, appearing in this Court along with Respondent Keegan were, for the most part, parents having children, and present or former public officials.[5]

Arizona School Choice Trust intervened as a Respondent, and is the one party most directly and substantially affected by the litigation. It is the only party that is a recipient of donations, the encouragement and increase of which was sought by the Arizona legislature's adoption of the tax credit bill.

As discussed at length in the Arizona Supreme Court Opinion, Petition A-21, *et seq.*, the tuition organization donation tax credit was challenged not only under the Establishment Clause of the First Amendment of the United States Constitution, but also under provisions of

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[5] Respondent Lisa Graham Keegan is the State Superintendent of Public Instruction, but who made her appearance as an intervenor also in a private capacity. Respondent Trent Franks was an Arizona legislator involved in the enactment of the private school scholarship donation credit and public school expense credit bill.

the Arizona Constitution, providing that "no public money or property shall be appropriated for or applied to any . . . support of any religious establishment," Ariz. Const. art. II, § 12, and that "no tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school. . .". Ariz. Const. art. IX, § 10. Petitioners also raised Arizona Const. art. IX, § 7, which prohibits the gift or loan of credit by the State to any individual, association or corporation.

The Arizona Supreme Court upheld the legislation, turning back the state constitutional challenge and the First Amendment Establishment Clause challenge. The Court commenced its Establishment Clause discussion by acknowledging that the test adopted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applied. It therefore considered *seriatim*, whether the tuition organization contribution tax credit (1) served a secular purpose; (2) had the principle or primary effect of either advancing or inhibiting religion; and (3) fostered an excessive government entanglement with religion. Petition A-6. The Opinion below also recognized that other approaches have been considered by the Court, but believed that the "well-settled" *Lemon* standard provided an appropriate framework for its review. Petition A6, 7.

The Court had little difficulty in finding a secular purpose for the challenged litigation. It recognized that, as noted in *Mueller v. Allen*, *supra*, a secular purpose can be gleaned from the face of the legislation itself. Petition A-7. It also noted, however, the succession of educational innovations (discussed by us, *supra*) to which this legislation was a further addition, which strengthened its view that a secular purpose existed. (Indeed, if any further support needed to exist for the recognition that encouragement of private schools in itself is not unconstitutional and is an acceptable secular purpose, the entire recent emphasis on "school choice" provides that rein-

forcement.) The Court also had no question that there could be no "excessive government entanglement" discerned from this school tuition organization donation tax credit law. Petition A-21. As the Court said:

> The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive. Taxpayers who choose to participate may deduct the amount of STO ["school tuition organization"] contribution on their tax returns. The STO operates free of government interference beyond insuring that it qualifies for Section 501(c)(3) tax exempt status and complies with state requirements." *Kotterman v. Killian,* Petition A-21.

As expected, the greater part of the Arizona Supreme Court's Establishment Clause analysis was directed to whether the primary effect of the legislation was either to advance or to inhibit religion. Petition A-9 to A-21. The Court properly focused on three aspects of this Court's Opinion in *Mueller, supra*: (1) whether the deduction [here, credit] in question was one of many allowed by the State; (2) whether it was open to all parents incurring education expenses; and (3) whether funds were available to a private sectarian organization "only as a result of numerous, private choices of individual parents." *Mueller, supra,* 463 U.S. at 396-400. Petition A-9.

The Court noted that the argument of the Petitioners was that tax credits were the "functional equivalent of depleting the State Treasury by a direct grant" while a tax deduction merely serves as "seed money." It disagreed. Petition A-10.

The Court discussed Petitioners' reliance upon *Committee for Public Education v. Nyquist.* It acknowledged that *Nyquist* said that the constitutionality of a tax benefit "does not turn in any event on the label we accord it" *Nyquist, supra,* 413 U.S. at 789: and observed that this statement from *Nyquist* was consistent with this Court's

earlier observation in *Lemon*, that the form of any tax measure must be examined "for the light that it casts on the substance." A-10, quoting 403 U.S. at 614. The Arizona Supreme Court acknowledged the Petitioners' argument that there are some mechanical differences between deductions and credits but concluded that such mechanical distinctions were really not constitutionally significant. Both credits and deductions ultimately reduce state revenues, both are intended to serve policy goals, and both clearly act to induce socially beneficial behavior by taxpayers. Petition A-10.

In discussing the two cases, *Nyquist* and *Mueller*, *supra*, the Arizona Court concluded that the New York deduction, dealt with in *Nyquist*, having a special statutory formula, was plainly designed to achieve a net per family gain irrespective of the amount of expense the parents would actually incur. Petition A-11, quoting 413 U.S. at 790. It observed that in *Mueller*, this Court recognized that the statute at issue in *Nyquist* involved thinly disguised tax benefits actually amounting to tuition grants to the parents of the children attending private schools. Petition A-11, quoting 463 U.S. at 394. The Arizona Court then analyzed the wording and effect of the Arizona School Tuition Organization Contribution Tax Grant and concluded that indeed the Arizona tax benefits were clearly part of the general Arizona tax regime, and that this one was "only one among many." Petition A-13, quoting *Mueller*, 463 U.S. at 396. The Court also concluded that the Arizona tuition donation credit, available not just to all parents but to all taxpayers who are willing to contribute to an organization like School Choice Trust, compared to *Mueller's* emphasis of the availability of the tax benefits to a broad class of recipients, overly fulfilled the "broad availability" prong of *Mueller*. Petition A-13. Finally, the Arizona Court's application of *Mueller* turned to the question of whether funds reached sectarian schools by virtue of "numerous

private choices" in contrast to direct state financial aid. Petition A-13, quoting 463 U.S. at 399. Because tuition funds only went to schools chosen individually by each parent, it found that to be the case.

The Arizona Court also found support in a recent school voucher case, *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 119 S.Ct. 466 (1998). It noted that a school voucher program represented a more direct form of aid than the granting of a tax credit to a taxpayer who previously had made a donation to a group such as School Choice Trust, which in turn had made a scholarship available to a student, which in turn ameliorated the financial burden to the student's parents who had the responsibility to make the tuition payment to the child's private school. Noting the dissent's contention that *Jackson v. Benson*, *supra*, was distinguishable because of the fact that the Wisconsin legislation contained some restriction on the application of voucher monies' use for religious purposes, the Arizona Supreme Court disagreed, primarily in recognition of the fact that *Mueller* itself, "while disallowing a tax deduction for the cost of textbooks used for religious instruction, placed no restriction on the uses to which the schools could put tuition payments qualifying for the deduction. *See*, 463 U.S. at 390, n.1. In addition, the statute in *Mueller* contained no "opt out" provision or requirement that schools admit students without regard to religion . . ." Petition A-14, n.3. The Court concluded, we submit quite inevitably, that the Arizona School Tuition Organization Donation Tax Credit is more like the tax deduction in *Mueller* than the voucher program in *Jackson*, but noted that even *Jackson* placed no limits on the uses to which recipient schools could put the state aid, *ibid.*

The Arizona Court also responded to the Petitioners' urging upon it of the statistical breakdown of schools

that were sectarian, and again turned to *Mueller*, and its conclusion that this Court was loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claim benefits under the law. As the Arizona Court said, "We also cannot predict how this tax credit may affect the ratio of secular to sectarian private institutions in the State." Petition A-19. The Arizona Court also had before it the record, described *supra*, demonstrating that even for private sectarian schools, parents' choices were based as much on three other concerns as upon religious training itself, *i.e.*, academic rigor, class size, and the maintenance of good order and discipline. *See* page 5, *supra*.

In sum, the Arizona Court carefully considered the applicable precedents, and rendered a decision which is substantially based upon an immutable fact that is important to this Court's consideration of whether granting *certiorari* and deciding this case might yield a compelling precedent for multiple other cases involving the concept loosely referred to as "school choice." That immutable proposition is that public funds simply did not find their way into private sectarian schools. Accordingly, as we discuss, *infra*, this case is quite *sui generis*, and was decided upon a unique set of facts and a fairly unique tax credit statute.

REASONS FOR DENYING THE WRIT

The petitions labor mightily to overcome the immutable fact that no public monies found their way into the coffers of School Choice Trust, let alone the parents of students, let further alone getting into the hands of the persons operating private schools, sectarian or secular. These efforts are to no avail. In addition, the Keegan Respondents, in urging upon this Court, a grant of a *certiorari* in this case attempt unsuccessfully to categorize this case as one presenting both a clear conflict with

another case—*Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999) and presenting a case out of which this Court could fashion an opinion producing broadly applicable Establishment Clause law to the wide variety of cases referred to as "school choice" cases. This case simply does not provide such a conflict, nor does it provide a vehicle for such a broad exegesis of Establishment Clause law.

I. THE ARIZONA SUPREME COURT OPINION WAS A REASONED ANALYSIS AND APPLICATION OF *LEMON*, *NYQUIST*, AND *MUELLER*, TO THE FACTS OF THIS CASE. THE KOTTERMAN PETITION ARGUES MERELY THAT IT BELIEVES THE ARIZONA COURT WAS WRONG.

Virtually all parties agree that the Arizona Supreme Court not only purported to, but did, examine and apply the *Lemon* test to decide this case. Kotterman Petition, p. 5; Rhodes Petition, p. 7; State Brief in Opposition, p. 8.[6]

The Kotterman Petition raises only two justifications for asking this Court to grant *certiorari* in this case. First it says that the Opinion evidences "some confusion as to the teaching of *Nyquist* and *Mueller*." Kotterman Petition, pp. 7, 18. Second, it argues that the Arizona Court got it wrong, citing specific aspects of its discussions of *Nyquist* and *Mueller*. Its argument in fact demonstrates how faithfully the Arizona Supreme Court understood and followed *Lemon*, *Nyquist* and *Mueller*.

Kotterman Petitioners argued, p. 8, that a very significant aspect of *Nyquist* was the fact that the deduction there at issue was not related in amount to the actual expenditures by the beneficiaries, for tuition. As we have

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[6] The Keegan Respondents do not say so explicitly, rather, generally concluding that "the Arizona Supreme Court below accurately applied this Court's precedents." Keegan Respondents' Statement, p. 8.

already set forth, the Arizona Court noted and properly distinguished the nature of the *Nyquist* deduction from the tax credit here. The tax credit here is for no more than amounts which are used for scholarship tuition funds (except for a nominal administrative portion) and therefore necessarily does not benefit beyond the actual education expenses. At the parent level, even the nominal administrative reimbursement does not apply.

The Kotterman Petition argues, pps. 9, 11, that an important aspect of the *Mueller* test is that the deduction (or credit) be part of a genuine system of tax laws. The Arizona Court recognized and applied that criterion. Indeed, the Kotterman Petition clearly demonstrates to this Court just how substantial was the basis for the Arizona Court's conclusion. For the Kotterman Petition identified twelve different tax credits in the Arizona Tax Code, with the credits ranging from 5% to 75% of payments or contributions. Kotterman Petition, p. 12, n.4. It also recognized four additional tax credits in the Arizona Tax Code, granting 100% tax credits. Kotterman Petition, p. 14, n.5. The Arizona Court certainly had a well grounded basis to conclude that the tax credits challenged here were part of a genuine system of tax laws. Indeed, it is almost a matter of state law whether these tax credits are or are not part of a genuine system of tax laws; a fact which counsels leaving this conclusion in the hands of the Arizona Court.

The Kotterman Petition argued that an important part of the *Mueller* test was that any benefit to sectarian schools be the result of numerous private choices. Kotterman Petition, pps. 12, 17. Again, the Arizona Court explicitly recognized such was an important consideration, and found such private choices to in fact exist in the hands of numerous private individuals—the contributors who chose the STO to which to donate, and the students and families, who chose the schools.

It certainly must be said that the provision of Supreme Court Rule 10, which teaches that a petition for a writ of certiorari is rarely granted when the asserted error only consists of the misapplication of a properly stated rule of law, governs here. The Kotterman Petitioners' argument reaffirms that not only did the Arizona Supreme Court apply the properly stated rule of law, but it applied it correctly.

II. THE RHODES PETITION SEEK TO GROUND REVIEW UPON AN ASSERTION OF THE MOST EXTREME HYPOTHETICALLY APPLICABLE FACTS THAT CAN BE ENVISIONED. IT ALSO FATALLY CONFLATES PAYMENT OF TAX REVENUES AS BENEFITS, WITH DONATIONS OF PRIVATE FUNDS, WHICH ARE MERELY INCENTIVIZED BY A TAX CREDIT.

The Rhodes Petition most suffers from the effect of studiously ignoring the immutable fact here—that no state funds provide benefits to sectarian organizations. This misperception or misinformation begins with the very first page of the Rhodes Petition—in the question presented—which includes the issue "are the tax revenues paid to STO's public funds? And if so, do such violate the Establishment Clause." As recognized by the State's brief, p. 17, *et seq.*, this simply is not what this case is all about.[7]

The Rhodes Petition also suffers from a flaw arising from its apparent assertion that it is acquiescing in a facial constitutional challenge to the statute, rather than a challenge to the statute as applied, Rhodes Petition,

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[7] The Kotterman Petition suffers from a similar ambiguity in describing the true facts of this case. The Kotterman Petition's question presented asks whether the redirecting of funds from the state treasury to private, sectarian schools, violates the Establshment Clause of the First Amendment. It also argues that there is an issue here of a "fundamental choice—made by the state—about where these public funds will go." Kotterman Petition, p. 7. Neither is true.

p. 9, fn.6, when in fact its position derives from the extreme opposite. It urges the most extreme hypothetical facts antagonistic to upholding the law, and proceeds from them. The Rhodes Petition argued that the Arizona Supreme Court rejected the dissent's contention that the statute would be invalid if, in operation, it were used by religion-specific STO's to subsidize full tuition out of state funds for students of particular religions. *Id.* It then contends that unless the decision below is reversed no "as applied challenge to the statute based on its use to subsidize religious education out of state funds, will hereafter be possible in Arizona courts." *Id.* Petitioner Rhodes then states that he agrees with the decision to address the constitutionality of the tuition organization donation tax credit statute at this time; implying that he agrees the law should be measured against a facial challenge to its constitutionality. However, instead of presenting his position to this Court under the terms of a facial attack on constitutionality, he does something else altogether.

This Court has held that there are two quite different ways in which a statute may be considered invalid on its face—"because it is unconstitutional in every conceivable application" or because it is overly broad. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984). Stated another way, a facial challenge to a legislative act is the most difficult to mount successfully because "the challenger must establish that no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

What that should mean is that the tuition organization donation tax credit must be upheld if there can be conceived of any way that its operation would escape violation of the Establishment Clause. What the Rhodes Petition does, however, is to cite extreme (indeed hardly likely) hypothetical circumstances to support his argument

that this statute is unconstitutional, *see* Rhodes Petition, pps. 10, 11, hypothesizing circumstances of the state authorizing individuals simply to send their tax payments directly to a church or synagogue; or providing for a check off on the tax return so that some tax monies received by the state would be directed to such sectarian schools. Moreover, *see* Petition, p. 14, in which Petitioner Rhodes raises the possibility that 100,000 Arizona taxpayers could band together and collectively choose to support a specific religion's schools, rather than lend their support to the state's revenue needs. Thus, he argues, they could direct as much as $50 million of "state income tax revenues [sic]" each year, thereby requiring the state, supposedly, to fund a particular religious school. These are not the facts. These are not the sort of "every conceivable application" by which a facial challenge is to be measured. And the Petition completely ignores the far more likely (indeed to a large degree actually occurring) setting in which this law will be applied. That application consists of the facts that are in this record, particularly the facts pertaining to School Choice Trust's organization and administration of its Trust, to receive and distribute donations for school tuition.

The Supreme Court of Arizona did not explicitly indicate whether it was measuring the statute facially, or as applied. School Choice Trust's evidence, however, at the very least demonstrates that there is a very rational, very logical set of circumstances in which the statute may be applied, and which strongly supports the ruling below upholding the statute. One of the very important yardsticks of the Establishment Clause is whether benefits to private recipients are allocated on the basis of criteria that neither favor nor disfavor religion. *Agostini v. Felton*, 521 U.S. 203, 230-232 (1997). As described in the Statement of Case, *supra*, School Choice Trust, which begun its operations five years before the statute at bar was enacted, has a very clearly neutral operating proce-

dure. The interested families are placed on a waiting list without regard to religion or the particular school which they wish to attend. The scholarships are awarded on a first come first serve basis. School Choice Trust grants a scholarship to the school of the parents' choice.

The Rhodes Petition's argument that 100,000 citizens might organize and require that all of their tuition monies derived from donations fund tuitions to schools of only one religion, is probably inspired by the dissent's assertion that maybe school tuition organizations could discriminate on the basis of religion. Pet. A-47. It is not at all obvious that such is the case.[8]

Another argument heavily pressed in this case is the contention that *Mueller's* requirement of broad-based availability of the benefit is not complied with because the tuition organization donation tax credit established by § 43-1089 only covers donations for scholarship grants for private schools. It is argued both in the Petitions, *e.g.* Kotterman Petition, pps. 11, 15, n.9, and in the dissent, that because the provisions of § 43-1089 only ran to private organizations, there was no neutral extension of benefits (*i.e.*, to both private and public school situa-

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[8] The dissent's assertion was probably premised upon the fact that the definition of a School Tuition Organization only says that such organizations shall provide educational scholarships or tuition grants to students "without limiting availability to only students of one school," and does not prohibit such organizations to discriminate on the basis of religion. Ariz. Rev. Stat. Ann. § 43-1089(E)(2). And it also defines a qualified school as one which does not discriminate on various bases, not including religion. Ariz. Rev. Stat. Ann. § 43-1089(E)(1). However, it is possible to argue that because a school tuition organization must grant scholarships to children "to allow them to attend any qualified school of their parents' choice," Ariz. Rev. Stat. Ann. § 43-1089 (E)(2), the law should be interpreted to prohibit school tuition organizations to discriminate in their scholarship grants on the basis of religion; *i.e.* that once a child is otherwise accepted for a scholarship, the parents' choice of a school must be honored, irrespective what religion, if any, operates that school.

tions). However, the Arizona legislature concurrently provided for a $200.00 tax credit that was claimable for payment of fees or expenses for extracurricular activities at public schools. The dissent and the Petitioners say that because this is a smaller credit, and because it was for extracurricular expenses and not for payments to the general fund for defraying public school educational expenses, that there was not an equal availability of tax credits. To accept the argument would be to dignify form over substance.

As we described at the outset, the circumstances of the Arizona public school system, at the time the tax credit was adopted, was such that a school child could go to any school district's school that would take him or her, and could also go to charter schools if accepted by them, with no tuition or fees. The education is to be "as nearly free as possible." Ariz. Const. art. XI, § 6. And taxpayers already paid a considerable portion of their taxes for public education.[9] Thus, for the legislature to have done anything other than what it did, in order to purport to allow the school tuition organization donation tax credit, would have been an exercise in futility. And given that the basic cost of education is defrayed from taxes, granting $200.00 instead of $500.00 as a credit for payments of public school extracurricular activity expenses, is very logical.

There is another significant aspect of this situation, when assessing the constitutionality of the statute facially, or as applied against the facts of this case.

The state has a compelling interest in encouraging private schools to undertake the education of students. The Rhodes Petition, Appendix A-98, provides illuminating

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[9] In the 1997-1998 school year, state funds for operating expenses (not capital) totaled $3,407,819,835.00. (Arizona Superintendent of Public Instruction 1997-98 Annual Report, p. 36, compilation of table).

facts about the benefit of the state encouraging private schools to educate children. Based upon the number of scholarships granted in 1998 according to the Arizona Dept. of Revenue (381), and upon the total dollar amount of those scholarships ($187,275.00), Rhodes Petition A-98, for a tax credit of something less than $500.00, the state saves an average of $4,625.00 for each child that matriculates in a private school instead of a public school.[10] In other words, for accepting $187,275.00 worth of tax credits, for those 391 scholarships, the state government conserved more than ten times that amount—$1,808,375.00. Arizona Superintendent of Public Instruction 1997-98 Annual Report, p. 36. In other words, rather than to assess the motivation for and effect of this law by Petitioner Rhodes' speculation about the wild extremes of money that supposedly would be lost to the state under this school tuition organization donation tax credit, it is better viewed in light of what is known about actual conditions. At the very least, these are "conceivable applications" of this statute. The Petitioner Rhodes is in effect arguing for a Dr. Jekyll/Mr. Hyde version of facial analysis of the constitutionality of the statute.

The Rhodes Petition, (and the dissent below), make some hard-to-understand attacks on the statute. Petitioner Rhodes argues that the Wisconsin case discussed by the Arizona Supreme Court, *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (Wis. 1998) *cert. denied*, was distinguishable because the benefits "applied only to children of the poorest families." Rhodes Petition, p. 20. He also contends that another distinction is that in Wisconsin the benefit program was limited to only 15% of the students in the particular district. Why an otherwise

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[10] The average dollar value of a scholarship according to the Dept. of Revenue figures contained in the Rhodes Petition was $471.00. The average operating cost to educate one child in the 1997-98 school year was $4,625.00. Report, n.9, *supra*.

qualified neutrally-offered benefit, whose impact on a parochial school is highly attenuated by the multiple steps of the process, starting with the taxpayers' donation and ending with matriculation in a private school, should be reviewed by this Court due to its availability to the wealthy or to a larger potential populous of student beneficiaries than was true in Wisconsin, does not appear. Similarly, *see* dissent, p. A-58.

III. THE RHODES PETITION IS WRONG IN ARGUING THAT 21 LEGISLATIVE BILLS, JUST LIKE THE ARIZONA STATUTE ARE BEING CONSIDERED OR ADOPTED.

Petitioner Rhodes asserts, Pet., p. 22, n.12, that in April 1999, tuition tax credit legislation was pending in 14 states, with 21 pending bills. He then argues that *certiorari* should be granted in this case in order to declare the law that might be applicable to these many pending legislative bills. Consideration of these proposed bills, however, discloses that deciding this case will not materially clarify the law applicable to those as-yet unpassed laws.

Of the 21 legislative bills cited by Petitioner, 14 did provide tuition tax credits, but they were to be provided directly to parents who paid for their children's private school tuition and not to people who donated money to nonprofit organizations.[11] Thus the structure of such bills, even if any of them are ultimately adopted, is quite different from this one. No school tuition organizations are involved. Deductions or credits are not granted to charitable donors who provided the donations for the tuition. These are important factual distinctions, for considering attenuation of benefits to sectarian schools; the issues of

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[11] Arkansas (HB2159), Connecticut (HB5893, SB1132, SB636), Delaware (SB59), Hawaii (SB12), Illinois (HB999, SB1075), Indiana (SB633), Kansaas (HB2242), Maine (LV1380, LV1786), Nebraska (LB484), Utah (SB159).

whether benefit to sectarian schools is the result of many private individual choices; and upon "entanglement."

Oregon and Texas were the only states that proposed tax credits similar to Arizona's Statute such that individuals could receive tax credits for making contributions to student tuition organizations.[12] To date, the Oregon House Bill has not been passed by the Oregon House or the Oregon Senate, and has not been submitted to Oregon's Governor for signature. Oregon's Legislative Information Office indicates that the Oregon legislature will likely adjourn within the next month, and the bill in question has been stuck in a House Committee since May 5, 1999.[13]

Regarding the two Texas bills cited by Petitioner, the last day of Texas' 1999 Legislative Session was May 31, 1999, and both bills were left pending in committees at that time.[14] In all, 20 of the 21 bills cited by Petitioner either died in State Legislative Committees, were not passed by the other State Legislative House, or were never submitted to State Governors for signature before the end of the respective legislative sessions.[15]

It is argued, Kotterman Petition, p. 19; Rhodes Petition, p. 11, that a supposed uncertainty about the Establishment Clause law related to tax credits accounts for the

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12 Oregon (HB2597), Texas (HB99, HB3645).

13 Telephone interview, Administrative Assistant, Oregon Legislature Office of Policy and Research Committee Services, June 10, 1999.

14 Texas Legislature's Online Legislative Information Site, www.capitol.state.tx.us, accessed June 10, 1999.

15 Arkansas (HB2159), Connecticut (HB5893, SB1132, SB636), Delaware (SB59), Hawaii (SB12), Illinois (HB999, SB1075), Indiana (SB633), Kansas (HB2242), Maine (LV1380, LV1786), Missouri (SB74, SB3, HB29), Nebraska (LB484), Texas (HB99, HB3645), Utah (SB159), West Virginia (HB2824).

failure rate of these bills. Such an argument is unpersuasive. We have found no case after *Mueller*, *supra*, in which a tax credit of any similarity to the one involved in this case has been invalidated. Indeed, there have been numerous cases indicating liberality towards allowing private benefits, against Establishment Clause challenge, from as long ago as five years, *e.g. Campbell v. Manchester Board of School Director*, 641 A.2d 352 (Vt. 1994). In *Campbell*, the Vermont court held that paying tuition costs of local students to attend approved public or private schools did not violate the Establishment Clause. Indeed, one of the reasons this Court ought not to take this case is because it is a much easier case to uphold the constitutionality of this statute, than others that have been recently considered and rejected by this Court for *certiorari*, or have been accepted or are pending *certiorari*, where direct benefit payments do flow from state to private school.

IV. THE KEEGAN RESPONDENTS' ASSERTION THAT THE BAGLEY CASE FROM MAINE IS A SQUARE CONFLICT WITH THIS CASE AND WITH *JACKSON v. BENSON* FROM WISCONSIN, IS SIMPLY INCORRECT.

This case is also quite different from other Establishment Clause cases concurrently being decided, and brought before this Court, which cases are better vehicles for addressing current Establishment Clause issues.

The Keegan Respondents in their statement assert that the recent decision by the Maine Supreme Judicial Court, *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), conflicts with this case and with *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied* 119 S.Ct. 466 (1998).[16]

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[16] Presumably they would also contend that *Strout v. Albanese*, No. 98-1986, 1999 WL 329272 (1st Cir. 27 May 1999), also conflicts. *Strout* reviewed the same statute *Bagley* did and reached the same result.

The Institute for Justice, counsel of record for the Keegan Respondents in this case, represents several parties who ask this Court, to use their cases as a vehicle to attempt liberalization of Establishment Clause clearance for various state educational initiatives which they broadly categorize as "parental choice." Keegan Statement, p. 12, *et seq*. They urged this Court to accept *Jackson, supra*; but *certiorari* was denied. They urge this Court to accept this case. And they indicate that they will file a petition in *Bagley*. Keegan Statement, p. 9, n.8.

These cases differ substantially from this one. All three, *Jackson*, the Wisconsin case, and *Bagley* and *Strout*, arising from Maine, involve more direct tuition payment or voucher systems, and thus are very different from this case having what we have characterized as the "immutable fact", that no state money went to a sectarian private school. In addition, this Court has already indicated that *Jackson v. Benson, supra*, is unnecessary to review, having denied *certiorari*. To the extent that general principles in *Jackson v. Benson* were cited with approval by the Arizona Supreme Court in this case, the denial of *Jackson* implies a denial for this case.

The *Bagley* and *Strout* cases are distinguishable at yet another level from this case. In each, the appellate court was asked to decide an equal protection challenge, not a direct Establishment Clause challenge. The Maine legislature had amended its system of allowing direct payment of tuition to private schools, by school districts not having public high schools. The amendment removed sectarian schools, which had previously been approved and participated. The removal was prompted by an opinion from the Maine Attorney General that to continue direct funding of sectarian schools would violate the Establishment Clause. The Maine Supreme Judicial Court, and the First Circuit, both were asked to decide whether this was a reasonable basis. Indeed, as the concurrence of

Senior Circuit Judge Campbell in *Strout, supra*, establishes, when clearly understood, the issue is not whether a statute properly included direct subsidies paid to sectarian schools, but rather whether the Maine legislature acted constitutionally under the equal protection clause to the United States Constitution by excluding sectarian schools from the possibility of subsidies. Judge Campbell would use a rational basis equal protection test. Thus, not only are the Maine cases and the Wisconsin cases ones of direct aid and not indirect aid (which *Strout* recognizes presents a dichotomy which is "a recurring theme throughout Establishment Clause litigation") the Maine cases, if creating a situation calling for review by this Court should be the ones upon which to grant *certiorari*, because of their raising of the issue through an equal protection prism.

Keegan Respondents cite other cases, urging this case as a candidate to speak to Establishment Clause issues. *See, e.g.* p. 10, n.9, discussing additional cases, including *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir., 1998), *cert. denied*, No. 98-1509, 14 June 1999; and *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom., Mitchell v. Helms*, No. 98-1648, 14 June 1999. These are presumably cited, again, to attempt to convince the Court that there is a burgeoning group of cases having relevant factual similarity. But both of these cases are quite different from this one, and the existence of those cases does not call for the acceptance of this case. Indeed, the grant of *certiorari* in *Mitchell* counsels a denial of *certiorari* in this case.

Columbia Union, supra, raised an issue similar to the *Bagley* and *Strout* Maine cases—whether a Columbia Union College exclusion from direct financial tuition aid because of its religious status is compelled by the Establishment Clause. However, the Fourth Circuit's decision turned upon the applicability of the principle in *Roemer*

v. Board of Public Works of Maryland, 426 U.S. 736 (1976) that irrespective of the constitutionality of aid to colleges that are merely "affiliated" with their religious order, such aid cannot be given to a college which is "pervasively sectarian." The Fourth Circuit remanded to determine the pervasiveness issue. There is no remotely similar issue before the Court in this case. However, *Columbia* does reinforce that the opinion below rightly noted *Mueller's* teaching that it is not appropriate in cases like this, to try to divine through statistics about periodic rates at which aid schemes benefit a greater or smaller percentage of sectarian schools, to measure the constitutionality of the program. *Accord, Agostini, supra*, 521 U.S. at 203, 237 (1997).

The lack of necessity, measured by any criteria, to grant *certiorari* in this case is emphasized by this Court's grant of *certiorari* in *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom., Mitchell v. Helms*, No. 98-1648, 14 June 1999. In *Helms*, the Fifth Circuit upheld the constitutionality of a shared education program, which provided much more direct benefit and considerably more entanglement, than is posed by this case. The Fifth Circuit did so based upon more recent cases of this Court including *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) and *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). And it did so even though the programs were more broad-based than either *Zobrest* or *Witters*. And in a second issue the Fifth Circuit struck down Title I programs calling for direct aid to private schools including secular schools, for the loan of equipment. On that issue, the Fifth Circuit, while acknowledging the evolution of Establishment Clause law, complied with this Court's dictate in, *inter alia, Agostini, supra*, that if a precedent of this Court has direct application in a case but yet appears to rest on reasons rejected in more recent cases of this Court, the Court of Appeals must necessarily

follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. The Fifth Circuit therefore struck down the loan-of-equipment program, following *Meek v. Pittenger*, 421 U.S. 349 (1975) which invalidated the Pennsylvania instructional equipment loan program.

Review of the *Helms v. Picard* case will provide this Court with a broad-based controversy, in which the Fifth Circuit validated some things and invalidated others. This case can really add nothing by way of significant, recurring, facts of direct monetary benefits, provision of services, or equipment. The grant of *certiorari* in *Mitchell* is sufficient.

V. WHILE SCHOOL CHOICE TRUST RAISED BELOW THE ISSUE OF PUTTING ASIDE THE *LEMON v. KURTZMAN* TEST, AND WOULD NECESSARILY RAISE IT HERE, RECONSIDERING *LEMON v. KURTZMAN* IS NOT NECESSARY FOR A CORRECT DECISION OF THIS CASE AND DOES NOT PROVIDE A REASON TO GRANT CERTIORARI IN THIS CASE.

Before the Arizona Supreme Court, School Choice Trust urged that a careful reading of the substance of the *Lemon v. Kurtzman* test sufficed to validate the school tuition donation tax credit law. Response of Intervenor Arizona School Choice Trust, Inc. to Petition for Special Action, p. 14 (hereinafter "School Choice Trust Response"). However, it went on to note that *Lemon v. Kurtzman* has been roundly criticized, *e.g. Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 718-721 (1994) (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 750-751 (Scalia, J., dissenting); *Rosenberger v. Rector*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). School Choice Trust Response at pps. 15, 16. School Choice Trust then urged that fundamental Establishment Clause principles derived from the

jurisprudence of the previous 25 years, applied outside of a mechanistic formula, supported the constitutionality of the school tuition donation tax credit law. Such fundamental principles, urged upon the Arizona Supreme Court, included prohibition against government "sponsorship, support or active involvement;" neutrality to religion, not hostility toward it; prohibition against significant and symbolic benefit; neutrality among and between religious and between them and non-religions; equal treatment of religions; and discerning whether the government acted with the purpose of advancing or inhibiting religion. School Choice Trust Response, pps. 16-20.

The Arizona Supreme Court in its decision, while acknowledging that "other approaches have been considered by the court,"[17] concluded that the well settled *Lemon* standards provided an appropriate framework for review, Petition A-7, and as already discussed, did review and affirm the constitutionality based upon the *Lemon* standards.

While School Choice Trust believes that the statute can be validated under both *Lemon* and a less mechanistic and more value-based mode of review, and will make the argument in this case that *Lemon v. Kurtzman* should be reconsidered if necessary to affirm,[18] it asserts that the validity of this Act is so clearly apparent, and that the facts of this case are so clearly out of the main stream of the "school voucher" and similar kinds of cases, that review is not warranted.

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[17] For example, the Court cited, Petition A-5, Kristin M. Engstrom, Comment, Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test, 27 Pac. LJ 121 (1995).

[18] *South Central Bell Telephone Co. v. Alabama*, —— U.S. ——, 119 S.Ct. 1180, 1186 (1999).

CONCLUSION

Arizona School Choice Trust is the one party which suffers the most, and most directly, from the continuing pendency of this case. Notice that in the list of Rhodes Petition's schedule of 1998 private school tuition organizations, donations to them, and scholarships granted by them in the calendar year 1998, that School Choice Trust is not listed at all. Petition A-98. This is because, in fairness to donors, School Choice Trust did not feel it could conduct its operations during the past year while the case has been before the Arizona Supreme Court with School Choice Trust as a party. It is of great importance to School Choice Trust that this case be dispatched forthwith by denial of review. For reasons we have set forth above, there is no good reason to "hold" this case for the decision in the *Helms v. Picard* case.

Accordingly, it is respectfully requested that *certiorari* be denied.

Respectfully submitted,

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June 1999

Nos. 98-1716 & 98-1718

Supreme Court, U.S.
FILED
MAY 25 1999
CLERK

In The

Supreme Court of the United States

PENNY KOTTERMAN, *et al.*,

Petitioners,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

LOUIS RHODES,

Petitioner,

v.

MARK W. KILLIAN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

RESPONDENT ARIZONA DEPARTMENT OF REVENUE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state law allowing an income tax credit for contributions to organizations that provide scholarships to secular and sectarian private schools violate the Establishment Clause of the First Amendment to the United States Constitution?

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INTRODUCTORY STATEMENT

Arizona has adopted a unique tax credit program to encourage contributions to nonprofit organizations that provide scholarships to students attending private schools. This program involves neutral tax benefits with only attenuated effects on the private schools. The connection between the State and the schools exists only because of independent decisions made by the taxpayers contributing the funds, the nonprofit organization providing the scholarships, and the parents who choose a school. The program does not endorse any particular religion, or religion over nonreligion, and does not coerce any person to participate in any religious activities.

The Arizona Supreme Court rejected Petitioners' challenge to the tax credit program under the Establishment Clause and several provisions of the Arizona Constitution. The court's exhaustive opinion is consistent with this Court's analysis of the Establishment Clause and creates no conflict with a decision either of another state court of last resort or of a United States Court of Appeals. Further review is unnecessary. Consequently, Respondent Arizona Department of Revenue through its Director, Mark W. Killian (hereinafter the "Department"), opposes the Petitions for Writ of Certiorari.[1]

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[1] Petitioners Penny Kotterman, Pantilo Contreras, Frieda Baker, Rev. Dr. Gerald S. DeGrow, Joanne Hilde, Michael J. Hogendyle, Pastor Stanley Jones, Jann Renert, James Ullman, and Rabbi Weizenbaum filed a Petition for Certiorari, No. 98-1716 (hereinafter "Kotterman Pet."). Petitioner Louis Rhodes

STATEMENT OF THE CASE

A. The School Tuition Organization Tax Credit

In 1997, Arizona enacted the School Tuition Organization Tax Credit, providing a tax credit for contributions to a School Tuition Organization that gives scholarships or tuition grants to children attending nongovernmental primary and secondary schools. 1997 Ariz. Sess. Laws, Ch. 48, codified as Arizona Revised Statutes Annotated ("A.R.S.") § 43-1089.[2] This legislation also provides a tax credit for fees paid to a public school for the support of extracurricular activities. A.R.S. § 43-1089.01.[3]

The School Tuition Organization Tax Credit is not available for contributions to private schools, but only for contributions to a charitable organization that is exempt from federal taxation under section 501(c)(3) of the Internal Revenue Code ("IRC") and allocates at least ninety

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filed a separate Petition for Certiorari, No. 98-1718 (hereinafter "Rhodes Pet."). The only difference between the issues raised in the respective Petitions is Petitioner Rhodes' second issue concerning the use of "public funds," which will be addressed in Argument III *infra*.

[2] Arizona Revised Statutes Annotated § 43-1089 is set forth in the Kotterman Petition at 2-3 and the Rhodes Petition at 1-3.

[3] A public school cannot charge fees for basic instruction. *See* ARIZ. CONST. art. XI, § 6; Ariz. Att'y Gen. Op. I94-004 (Ariz. 1994). While A.R.S. § 43-1089.01, which authorizes up to a $200 credit for public school support, refers to a credit for fees paid for extracurricular activities, the Department has interpreted and applied the statute to allow a tax credit to any taxpayer who contributes to a public school for support of extracurricular activities. Ariz. Dep't of Revenue Publication 707 (1998).

per cent of its annual revenue for educational scholarships or tuition grants and does not limit availability only to students of one school. A.R.S. § 43-1089(E)(2). To qualify as a 501(c)(3) organization, the School Tuition Organization must comply with stringent requirements, and inform the Internal Revenue Service ("IRS") about its criteria for selecting scholarship recipients, rules of eligibility, how and by whom the recipients will be selected, and provide the IRS with a copy of the scholarship application form and any brochures or literature describing the scholarship program. *See* IRS Publication 557 at 19 (May 1997). The credit is in lieu of any Arizona income tax deduction, and no credit is allowed if the taxpayer designates the donation for the direct benefit of any dependent of the taxpayer. *See* A.R.S. § 43-1089(C) and (D). Scholarships and tuition grants must allow students to attend "qualified schools," which must be nongovernmental primary and secondary schools that do not discriminate on the basis of race, color, handicap, familial status or national origin, and that satisfy the requirements prescribed by law for private schools in Arizona. *See* A.R.S. § 43-1089 (E)(1); *see also* A.R.S. § 15-802 (prescribing, *inter alia*, that students be provided instruction in at least reading, grammar, mathematics, social studies, and science).

The direct beneficiaries of the School Tuition Organization Tax Credit are the individual taxpayers who choose to donate their personal funds to the organization. Indirect benefits also accrue to the School Tuition Organizations and the children who receive scholarships or tuition grants. While these scholarships and grants may be paid to qualifying schools, there is no evidence in the

record that these schools will receive more funds than they would have otherwise received, or that the schools will be relieved of any costs that they already incur.[4]

The School Tuition Organization Tax Credit, which reduces the tax burdens of those who contribute their personal funds to further the education of Arizona's children, is consistent with Arizona's legislative policy of promoting a variety of educational opportunities for children. Other Arizona legislation that provides parents with an increased ability to choose the best education to meet his or her child's needs includes legislation requiring school districts to allow students who live outside of the district to enroll in the district's schools without paying tuition, A.R.S. § 15-816.01, and legislation authorizing charter schools to receive public funds and prohibiting charter schools from charging tuition, A.R.S. §§ 15-181 to 189.02. *See also* A.R.S. § 15-181(A) (The purpose of charter schools is to provide both a learning environment that will improve pupil achievement and additional academic choices for parents). Like open enrollment and charter schools, the School Tuition Organization Tax Credit fosters a greater range of academic choices for Arizona's parents and children.

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[4] Petitioner Rhodes argues that information reported to the Department shows the majority of the scholarships and tuition grants are to children attending sectarian schools. Rhodes Pet. at 5 n.4. This information does not reflect complete reporting by all organizations and was not part of the record before the lower court, which considered only a facial challenge to the constitutionality of the tax credit. Moreover, it does not show that the schools received any more funds than they would have otherwise received from students paying tuition.

The School Tuition Organization Tax Credit is also consistent with Arizona and federal law that provides tax benefits for contributions to charitable organizations that award scholarships to students who attend private schools. *See* IRC § 170 (deductions for charitable contributions); A.R.S. § 43-1042 (adopting federal deductions for Arizona income tax purposes). With a top federal marginal tax rate of 39.6% (*see* IRC § 1) and a top Arizona marginal tax rate of 5.17% (*see* A.R.S. § 43-1011), the total tax savings for a $500 tax *deduction* would be approximately $224 (44.77%). The School Tuition Organization Tax Credit merely expands the current benefits available under the tax code, so that instead of a benefit under state and federal law of up to $224, a taxpayer who contributes personal funds to a School Tuition Organization can obtain up to a $500 tax benefit.[5]

Moreover, providing a tax credit rather than a tax deduction is not new to tax law. Tax credits have been a fixture of Arizona and federal income tax since income taxes were first enacted. Arizona law currently contains four dollar-for-dollar credits: A.R.S. §§ 43-1089 (up to $500 for contributions to school tuition organizations); 43-1089.01 (up to $200 for public school extracurricular activities); 43-1088 (up to $200 for contributions to charitable organizations that provide assistance to the working poor); and 16-954 (enacted as Proposition 200 in the 1998

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[5] Contrary to Petitioner Rhodes' assertion, Rhodes Pet. 4 n.3, taxpayers will not profit from making the contribution. While some taxpayers may be able to claim a charitable deduction on their federal return for the contribution under IRC § 170, claiming the credit will correspondingly reduce their state income tax deduction under IRC § 164.

general election, allowing a credit of the greater of $500 or 20% of the tax amount for contributions to the Clean Elections Fund). Numerous partial credits are also available to taxpayers. *See* A.R.S. §§ 43-1071 to 1090; *see also* Kotterman Pet. 13 n.4. Similarly, Congress has allowed numerous tax credits to be applied against federal income tax liability in the Internal Revenue Code. *See* IRC §§ 21 to 52.

B. Procedural Background

Shortly after the enactment of the School Tuition Organization Tax Credit, Petitioners, eleven Arizona citizens and taxpayers, filed a Petition for Special Action directly in the Arizona Supreme Court challenging the constitutionality of the credit under the federal Establishment Clause and the Arizona Constitution.[6] The Special Action sought an order enjoining Respondent Mark W. Killian, in his official capacity as Director of the Department, from implementing the credit.

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[6] In Arizona, a Special Action is a form of relief that replaces the common law writs of certiorari, mandamus, and prohibition, and is available where there is no equally plain, speedy, and adequate remedy by appeal. *See* Ariz.R.Proc.Sp.A. 1. All parties agreed that the Arizona Supreme Court should accept jurisdiction of the Special Action in the hopes that the constitutionality of the tax credit could be determined before the tax credit became fully effective in 1998. The record before the Arizona Supreme Court consisted only of documents and affidavits included as exhibits to the pleadings. *See* Ariz.R.Proc.Sp.A. 7(e).

A majority of the Arizona court sustained the tax credit under both the Arizona and federal constitutions. Kotterman Pet. 2a-40a; Rhodes Pet. A3-A45. The court held that the tax credit had a secular purpose, did not foster excessive governmental entanglement with religion, did not have the primary effect of furthering religion, and did not endorse religion or coerce anyone into participating in religious activities. Kotterman Pet. 4a-19a; Rhodes Pet. A3-A21. The court also found no violation of the Arizona constitution because there was no appropriation of public money or property for private schools or for religious worship or instruction. Kotterman Pet. 19a-40a; Rhodes Pet. A21-A45.

Two justices dissented, disagreeing with the majority's interpretation of the Arizona constitution. Kotterman Pet. 53a-85a; Rhodes Pet. A60-A96. The dissenters did not disagree with the majority that the tax credit has a secular purpose and does not involve excessive entanglement between religion and government, but concluded that the primary effect of the tax credit is to advance sectarian aims of nonpublic schools and that it therefore violated the Establishment Clause. Kotterman Pet. 43a-53a; Rhodes Pet. A48-A59.

THE COURT SHOULD DENY THE PETITIONS.

There is no compelling reason for this Court to review the Arizona Supreme Court's decision in this case. First, the Petitions do not present a novel federal question because the lower court correctly applied this Court's holdings in *Mueller v. Allen*, 463 U.S. 388 (1983), and

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), to uphold the unique Arizona tax credit in this case. Second, there is no conflict between the Arizona decision and either a decision of a state court of last resort or a United States Court of Appeals. The tax credit in dispute exists only in Arizona and no other court in the nation has addressed the application of the Establishment Clause to the issue decided by the Arizona Supreme Court. Consequently, none of the reasons this Court has included in its rules as justifying review are present here. *See* Supreme Court Rule 10.

I. THE ARIZONA DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

Applying the three-part test used by this Court in some Establishment Clause cases, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court found the Arizona law to be valid under each of the three parts.[7] In reaching its conclusions, the court relied extensively on this Court's holding in *Mueller* as well as the Court's more recent Establishment Clause decisions that recognize that not all government aid to the educational function of religious schools is invalid. *See Agostini v. Felton*, 521 U.S. 203, 225 (1997). The lower court correctly concluded that

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[7] Under *Lemon* a law must (1) have a secular purpose, (2) have a primary effect that does not advance religion, and (3) not create excessive entanglement between government and religion. *Lemon*, 403 U.S. at 612-13. While the *Lemon* test is often applied, this Court has also "emphasized that it provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller*, 463 U.S. at 394 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

the Arizona tax credit is constitutional under this Court's precedents.

A. There Is No Constitutional Distinction Between the Tax Deduction Upheld in *Mueller* and the Tax Credit at Issue Here.

In *Mueller*, the Court upheld a Minnesota statute that allowed state taxpayers to deduct actual expenses incurred for the tuition, textbooks, and transportation of dependents attending elementary or secondary school. *Mueller*, 463 U.S. at 391. The Court found several features of the Minnesota tax deduction in *Mueller* particularly significant in concluding that the legislation's principal or primary effect was one that neither advanced nor inhibited religion. *Mueller*, 463 U.S. at 396-402. Those factors include (1) the Court's recognition that legislatures traditionally are given especially broad latitude in creating classifications and distinctions in tax statutes and that therefore the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burdens of its citizens and encourages desirable expenditures for educational purposes was entitled to substantial deference; (2) the deduction was only one among many deductions allowed under Minnesota income tax law; (3) the deduction was available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian or sectarian private schools; (4) the aid went to parents of school children rather than directly to the schools and therefore the financial benefits resulting to parochial schools was attenuated; and (5) the benefits of the law can be fairly regarded as a rough

return for the benefits provided to the State and all taxpayers by parents sending their children to parochial schools. *Id.*

Arizona's tax credit is similar to the Minnesota tax deduction with respect to the factors that the Court found significant in *Mueller*. The Arizona Legislature's determination that a credit for donations to charitable organizations that award scholarships to students who attend private schools will encourage desirable expenditures to support education is entitled to substantial deference. Further, the tax credit here is one among numerous tax credits that exist in the Arizona income tax law, including the new one for fees and contributions paid to public schools. *See* A.R.S. §§ 43-1071 to 1090. In addition, the Arizona tax credit is merely an expansion of a tax deduction for charitable contributions which traditionally exists in the law. Tax benefits to parents for payment of school tuition are rare, but tax benefits for contributions to charitable organizations that grant scholarships are the general rule. *See* IRC § 170. Moreover, the Arizona law is even further removed from sectarian schools than was the direct benefit to parents upheld in *Mueller*. Under A.R.S. § 43-1089, the aid does not go to the schools, but to a qualified School Tuition Organization that makes grants to children. The financial benefit to the schools is attenuated, and, indeed, is totally speculative. Thus, Arizona's tax credit, which goes to a charitable organization instead of to parents for payment of school tuition is entitled to greater deference than the tax deduction upheld in *Mueller*. Finally, just as in *Mueller*, the benefits of the law can be regarded as a rough return for the benefits provided by private taxpayers, who, in this case, donate their

own funds to aid children other than their own to attend private schools.

Petitioners argue that because Arizona allows a tax credit rather than a deduction it is not "part[ ] of a genuine system of tax laws." Kotterman Pet. at 12 (quoting *Mueller*, 463 U.S. at 396 n.6). To the contrary, the School Tuition Organization Tax Credit is consistent with Arizona's other tax credits including a credit for fees paid for extracurricular expenses and with the tax deductions for charitable contributions. Moreover, the difference between a deduction and a credit cannot be of constitutional significance because deductions and credits are simply different ways to reduce taxes owed by the particular taxpayer. If a credit is considered to be different than a deduction, because it allows a dollar-for-dollar benefit, then would a 90% credit pass constitutional muster, or a 75% credit, or 50%, as compared to the 44.77% tax benefit currently realized by taxpayers for a federal and Arizona tax deduction? *See* p. 5 *supra*. The difficulty of drawing such a line shows that tax benefits provided to taxpayers must be treated the same without regard to the label, and therefore *Mueller* controls.

Petitioners also attempt to distinguish *Mueller* by pointing out that the Minnesota tax deduction was available to all parents, including those whose children attend public schools, while the Arizona credit is available only for nongovernmental schools. Kotterman Pet. 1, 15-16; Rhodes Pet. 16-19. This distinction is meaningless in Arizona, however, because as a matter of state policy, Arizona residents are not charged tuition. *See* A.R.S. § 15-816.01. The statute could provide for tuition scholarships for public school students, but the provision would

be meaningless because students are already given a free public education. Because the Arizona Legislature has already established a policy of no public school tuition for Arizona residents, the Arizona statute is as neutral as the Minnesota law.[8]

Significantly, the Arizona law includes tuition to any nongovernmental schools, not just sectarian schools. Petitioners admit that 37.9% of Arizona's private schools are nonsectarian. Petition to the Arizona Supreme Court ("Arizona Pet."), Ex. F at 18. Because the law is neutral between religious and nonreligious schools, it neither advances nor inhibits religion. *See Agostini*, 521 U.S. at 231 (state aid is less likely to have the effect of advancing religion "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis.").

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[8] Minnesota also provided its citizens with free elementary and secondary schooling. *See Mueller*, 463 U.S. at 391 (citing Minn. Stat. §§ 120.06, 120.72). The petitioners in *Mueller* argued that because public education was free in Minnesota, the tax deduction primarily benefitted religious institutions. *Id.* at 401. The Court rejected the argument, noting that the parents of public school children could use the deduction for some items and concluding that "the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief." *Id.* In Arizona, there is less reason to provide a credit for public schools because, unlike Minnesota, Arizona public schools do not charge tuition for attendance of students in public schools outside the district in which they live. *See* A.R.S. § 15-816.01. Further, Arizona does give a credit for fees paid for extracurricular activities by parents of public school students. *See* A.R.S. § 43-1089.01.

B. *Nyquist* Does Not Require the Invalidation of Legitimate Tax Credits for Charitable Contributions.

Petitioners' reliance on *Nyquist* ignores the facts of that decision and how it was later interpreted in *Mueller*. Because the Arizona School Tuition Organization Tax Credit is a genuine tax credit for charitable contributions, it is not invalid under *Nyquist*.

The New York statute at issue in *Nyquist* provided for direct money grants to nonpublic schools and a form of tax relief for those who failed to qualify for the tuition grant program. This Court noted that the law provided that parents who failed to qualify for the tuition reimbursement could subtract from their adjusted gross income a designated amount for each dependent for whom they paid at least $50 in nonpublic school tuition. *Nyquist*, 413 U.S. at 765. The Court also noted that the amount of the deduction was not dependent upon how much the taxpayer actually paid for nonpublic school tuition. *Id.* at 766. The formula was apparently designed to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. *Id.* The Court concluded that in practical terms there was little difference, for purposes of determining whether such aid had the effect of advancing religion, between the tax benefit and the tuition grant. *Id.*

In *Mueller*, this Court distinguished *Nyquist* as not involving a "genuine tax deduction" because the tax benefits were actually disguised direct grants:

> Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist*. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [state's assistance to parochial schools must be examined] for the light that it casts on the substance." The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

Mueller, 463 U.S. at 396 n. 6 (citations omitted). The Court further noted that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject," and concluded that "[w]here . . . aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (citation omitted).

Similarly, the Arizona tax credit is a genuine tax measure that does not violate the policies underlying the Establishment Clause because allowance of a tax credit for support of educational opportunities cannot be viewed as an endorsement of religion. As the Arizona Supreme Court explained:

> The decision-making process is completely devoid of state intervention or direction and protects against the government "sponsorship, financial support, and active involvement" that

> so concerned the framers of the Establishment Clause. As the *Mueller* Court noted, "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit." 463 U.S. at 400, 103 S.Ct. at 3070. Under the circumstances, we believe that "[n]o reasonable observer is likely to draw from [these facts] an inference that the State itself is endorsing a religious practice or belief."

Kotterman Pet. 14a; Rhodes Pet. A16 (citations omitted).[9]

The Arizona School Tuition Organization Tax Credit is not a disguised tuition grant like that struck down in *Nyquist*. It is a genuine tax credit in that it gives a tax benefit to individual taxpayers who contribute money to a qualifying organization. The school tuition organizations must be 501(c)(3) organizations, and give scholarships and tuition grants to children. In this respect they

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[9] The Arizona Supreme Court also recognized that there is no coercion involved in the tax credit: "This tax credit may provide incentive to donate, but there is no arm twisting here. Those who do not wish to support the school tuition program are not obligated to do so. They are free to take advantage of a variety of other tax benefits, or none at all." Kotterman Pet. 15a; Rhodes Pet. A17. Indeed, Petitioner Rhodes' hypothetical taxpayer with $500 or less of income tax liability could choose from among any of the four dollar-for-dollar credits noted above to reduce his or her tax liability to zero, or the taxpayer could choose to let the State have the money. According to Petitioners, the financial effect of each choice would be the same, but a School Tuition Organization would still only receive a contribution based on a knowing and voluntary choice by the taxpayer.

are no different than countless other charities, foundations, or funds established to receive tax deductible contributions which will benefit religious, charitable, and educational activities. Aid to schools is available only as a result of decisions of individual donors, as well as decisions by individual parents to seek scholarships and send their children to qualifying schools. The law does not require any monitoring or inspection of the schools by the State, or even any reports from the schools. The connection, if any, between the State and the schools is triple removed, with the taxpayer, the tuition organization and the children occupying the space between. The tax law encourages an activity deemed to be in the public interest, that is – voluntary contributions that assist parents seeking to educate their children.

Petitioners also fail to acknowledge that Establishment Clause law has not remained static since the decisions in *Nyquist* in 1973 and *Mueller* in 1983. Two years ago this Court held that its "Establishment Clause law has significantly changed" since the mid-1980s, particularly with regard to the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223, 237 (internal quotes omitted). The Court held that it is no longer the rule that "all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Following *Agostini*, a program such as Arizona's, where there is no direct aid but only indirect tax benefits, is on even stronger ground than when *Mueller* was decided. The majority below, thus, properly reached its decision by considering this Court's current understanding of Establishment Clause law to apply correctly the

holdings of *Mueller* and *Nyquist*. Therefore, the Petitions should be denied.

C. The Lower Court Applied a Properly Stated Rule of Law.

Petitioners do not, and cannot, assert that the lower court failed to recognize the law that should properly guide its decision. Indeed, both the majority and dissenting opinions discuss and consider in detail *Mueller* and *Nyquist*, the primary cases relied upon by all Petitioners. Petitioners, although incorrect that the lower court erred, merely disagree with the Arizona Supreme Court as to an application of "a properly stated rule of law." Consequently, the Petitions should also be denied because a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Supreme Court Rule 10.

II. THE ARIZONA DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR ANY FEDERAL CIRCUIT COURT.

Petitioners do not contend that the decision here conflicts with a decision of another state court of last resort or a decision of a United States Court of Appeals. And, contrary to the assertion of the Respondents who were intervenors below, *see* Statement of Respondents Keegan et al. at 9, there is no conflict between the Arizona Supreme Court's decision and the decision of the Maine Supreme Court in *Bagley v. Raymond School Dep't*, 1999 ME 60, 1999 WL 236464 (Me. Apr. 23, 1999). The

issue in the Maine case involved direct tuition payments to religious schools. The Arizona tax credit is not given to parents, students, or schools, but to taxpayers making voluntary contributions for scholarships and tuition grants. The issues in the two cases are legally and factually distinct, and a decision on the tax credit issue will not resolve the direct aid issue present in the Maine case. Therefore, there is no conflict, and review here is unnecessary.

The tax credit issue is a peculiarly Arizona matter that may never arise in any other state. Indeed, in their Petition to the Arizona Supreme Court, Petitioners recognized that the challenged tax credit was more likely to run afoul of the Arizona Constitution than of the United States Constitution, characterizing the Arizona Constitution as "an independent source of constitutional law, which often 'contains broader and more protective language' than its federal counterpart." Arizona Petition at 7 (citation omitted). Many other states also have state constitutional limitations on aid to private or religious schools that are at least as restrictive as Arizona's.[10] Thus,

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[10] For example, twelve of the fourteen states that Petitioner Rhodes states have tax credit legislation pending, *see* Rhodes Pet. at 22 n.12, have state constitutional restrictions on aid to religion or private schools, or both. *See* ARK. CONST. art. 14, § 2 (no use of public school fund other than for the respective purposes to which it belongs); CONN. CONST. art. 8, § 4 (no diversion of public school funds from support of public schools); DEL. CONST. art. X, §§ 3 and 4 (no funds appropriated or raised for educational purposes shall be used in aid of any sectarian school or for any other purpose than the support of free public schools); HAW. CONST. art. X, § 1 (no public funds appropriated for the support or benefit of any sectarian or

any similar tax credit scheme may be found to be invalid on independent state grounds, rather than based on the federal constitution. Only if such a plan survives a state constitutional challenge, but is stricken under the Establishment Clause, may this Court then be called upon to resolve the conflict. There is no present need to address this unique issue.

III. WHETHER "PUBLIC FUNDS" ARE USED IS NOT AN ISSUE UNDER THE FEDERAL CONSTITUTION.

Petitioner Rhodes presents as a question before the Court whether the income tax revenues paid to School Tuition Organizations by taxpayers are "public funds." Rhodes Pet. i. While this was an issue below for purposes

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private educational institution); ILL. CONST. art X, § 3 (no use of public funds to support any school controlled by a sectarian denomination); IND. CONST. art. 1, § 6 (no money shall be drawn from the treasury for the benefit of any religious institution); KAN. CONST. art. 6, § 6 (no religious sect or sects shall control any part of the public educational funds); MO. CONST. art. IX, § 8 (no use of public funds to support any school controlled by a sectarian denomination); NEB. CONST. art. VII, § 11 (no appropriation of public funds for any school not owned or exclusively controlled by the state, except for special education); ORE. CONST. art. I, § 5 (no money shall be drawn from the treasury for the benefit of any religious institution); TEX. CONST. art. 7, § 5 (no appropriation from school fund for the support of any sectarian school); UTAH CONST. art X, § 9 (no appropriation for the direct support of any school controlled by any religious organization). Based on their arguments below relating to Arizona's constitution, Petitioners must believe that tax credits would be contrary to each of these state constitutional provisions.

of article II, section 12 and article IX, section 10 of the Arizona Constitution, which prohibit the use of "public funds" for various purposes, it is not an issue under the Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion." Contrary to Petitioner's contention, Rhodes Pet. 7-8, the Arizona Supreme Court did not rest its Establishment Clause ruling on any determination that "public funds" were not used. The "public funds" issue was only one of Arizona state law. The Arizona Supreme Court ruled that the tax credit did not violate the prohibition in the Arizona Constitution against giving public funds to private or religious schools. *See* Kotterman Pet. 19a – 39a; Rhodes Pet. A 21-45. The Arizona court did not, however, attempt or need to define "public funds" in the Establishment Clause portion of its opinion. *See* Kotterman Pet. 4a-19a; Rhodes Pet. A4-A21. It is unnecessary for "public funds" to be defined here, and the issue is not properly before the Court.

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The Arizona School Tuition Organization Tax Credit does not violate the Establishment Clause of the First Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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May 26, 1999